### TRANSCRIPT OF RECORD

# Supreme Court of the United States OCTOBER TERM, 1999 1960



ALBERT MARTIN COHEN, PETITIONER,

US.

DENIS M. HURLEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED MAY 7, 1960 CERTIORARI GRANTED JUNE 6, 1960

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#### No. 921

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[fol: 1]

#### IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of Albert Martin Cohen, an Attorney, Respondent-Appellant,

DENIS M. HURLEY, Petitioner-Respondent. .

#### STATEMENT UNDER RULE 234

This is an appeal from an order of the Supreme Court, Appellate Division, Second Department, dated December 31, 1959, and entered on the 31st day of December, 1959, in the office of the Clerk of the Appellate Division, whereby it was ordered, one Justice dissenting, that appellant be disbarred from the practice of the law.

This proceeding was instituted by an order to show cause dated the 13th day of July, 1959, and a petition of Denis M. Hurley, verified July 9, 1959, with the exhibits thereto annexed.

The appellant duly served and filed his answer on or about July 31st, 1959.

The parties to this proceeding are the appellant Albert Martin Cohen.

The respondent is Denis M. Hurley, attorney pro se. The attorney for the appellant is David F. Price.

There has been no change of parties or attorneys herein.

[fol. 2]

In Supreme Court of the State of New York

Appellate Division—Second Department

\_\_\_\_

In the Matter of ALBERT MARTIN COHEN, An Attorney, Respondent.

#### Notice of Appeal—January 7, 1960

Please Take Notice that Albert Martin Cohen, respondent above named, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court for the Second Department, dated December 31st, 1959, and entered on the 31st day of December, 1959, in the office of the Clerk of the Appellate Division, Second Department, whereby it was ordered, one Justice dissenting, that respondent be disbarred from the practice of the law, and from each and every part thereof. Dated: January 7th, 1960.

David F. Price, Attorney for Respondent, 66 Court Street, Brooklyn, New York.

To:

Hon, Denis M. Hurley, Attorney for Petitioner, Borough Hall, Brooklyn, New York.

Hon. John J. Callahan, Clerk of the Appellate Division, Second Department. [fol. 3]

#### IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION-SECOND JUDICIAL DEPARTMENT

#### Present:

Hon. Gerald Nolan, Presiding Justice, Hon. Henry G. Wenzel, Jr., Hon. George J. Beldock, Hon. Henry L. Ughetta, Hon. Philip M. Kleinfeld, Justices.

ORDER APPEALED FROM-December 31, 1959

#### Order of Disbarment

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an order directing that the respondent Albert Martin Cohen (admitted Second Judicial Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and the respondent Albert Martin Cohen having filed an answer verified July 31st, 1959, and the said proceeding having come on to be heard by an order to show cause, dated July 13; 1959.

[fol. 4] Now on reading and filing said order to show cause, the petition, the answer, respondent's brief and respondent's reply brief, the exhibits, the testimony of respondent before the Additional Special Term, and all the papers filed herein, and Mr. Denis M. Hurley, petitioner, appearing in person, and Mr. David F. Price appearing for respondent, and due deliberation having been had thereon; and upon the majority opinions of the court herein, heretofore filed:

It Is Ordered that by reason of the misconduct established by the evidence, the said Albert Martin Cohen, be and he hereby is disbarred and removed from the office of attorney Further Ordered, pursuant to the appropriate provisions of the Judiciary Law of the State of New York, that the said Albert Martin Cohen is hereby commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and is forbidden to appear as attorney and counselor at law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law or its application or any advice in relation thereto, and it is

Further Ordered that the respondent, Albert Martin Cohen, have leave to apply to vacate this order upon proof that, within 30 days after the entry of this order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such [fol. 5] Justice all relevant records in accordance with the subpoena duces tecum.

Opinion by Beldock, J. Wenzel and Ughetta, JJ., concur with Beldock, J., Nolan, P.J., concurs in separate opinion; Kleinfeld, J., dissents and votes to dismiss the proceeding, in opinion.

Enter:

John J. Callahan, Clerk.

Clerk's Certificate to foregoing paper (omitted in printing).

IN SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

ORDER TO SHOW CAUSE-July 13, 1959

Upon reading and filing the annexed petition of Denis M. Hurley, verified the 9 day of July, 1959, with the exhibits thereto annexed, it is

Ordered, that the respondent, Albert Martin Cohen, show cause before this Court at the Courthouse, 45 Monroe Place, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 14th day of July, 1959, at Ten o'clock in the Forenoon of that day, or as soon, thereafter as counsel can be heard, why an order should not be made herein directing that the respondent, Albert Martin Cohen, as an attorney and counselor-at-law, be disciplined upon the charges set forth in the annexed petition, and why such other or further action upon the charges embodied in the annexed petition, as justice may require, should not be had and for such other and further relief in the premises as may be just and proper.

Sufficient reason appearing therefor, it is

Ordered, that service of a copy of this order and of the petition with exhibits annexed upon the respondent on or before 5 P. M. the 13th day of July, 1959, shall be deemed sufficient.

Dated: Brooklyn, New York, July 13th, 1959.

George J. Beldock, Associate Justice, Appellate Division, Supreme Court, Second Judicial Department.

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[fol. 7] -

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION-SECOND JUDICIAL DEPARTMENT

PETITION, READ IN SUPPORT OF MOTION-July 9, 1959

To the Honorable Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department:

The petition of Denis M. Hurley respectfully alleges:

1. That by an order of this Court dated and filed June 22, 1959, a copy of which is annexed marked Exhibit A, petitioner was duly designated and directed to institute in this Court disciplinary proceedings against the respondent, Albert Martin Cohen, as an attorney and counselor-at-law, based upon his misconduct as an attorney and counselor-at-law, as recommended in the report of Hon. Edward G. Baker, a Justice of the Supreme Court of the State of New York, filed with the Clerk of this Court on June 8, 1959, and as indicated in the evidence and exhibits presented before the Additional Special Term of this Court in a proceeding established by order of this Court dated January 21, 1957, as amended by order dated February 11, 1957, all as more fully hereinafter described.

[fol. 8] 2. That said order of June 22, 1959, was duly entered in the proceeding established by the said order of January 21, 1957, as amended by order dated February 11, 1957, which is entitled; "In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into certain alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice, by Attorneys and Counsellors-at-law and by others acting in Concert with them in the County of Kings," (hereinafter called "Judicial Inquiry and Investigation"). A copy of the said order of January 21, 1957 and a copy of the amending order of February 11,

1957 are annexed hereto as a single exhibit, marked Exhibit B.

- 3. Upon information and belief, that the respondent, Albert Martin Cohen, was admitted to practice as an attorney and counselor-at-law in the Courts of the State of New York at the December, 1922 Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and has ever since acted as such attorney and counselor-at-law.
- 4. That the respondent, Albert Martin Cohen, resides in the County of Kings, State of New York, and that at all times hereinafter mentioned he was an attorney practicing law with an office in the County of Kings, State of New York.
- 5. That at all of said times the respondent, Albert Martin Cohen, practiced law in the Courts of the County of Kings, State of New York.
- [fol. 9] 6. That at all relevant times hereinafter mentioned the respondent, Albert Martin Cohen, also practiced law in association or in partnership with Louis I. Rothenberg, under the name of Cohen & Rothenberg, with offices at 16 Court Street, in the County of Kings, State of New York.
- 7. During the course of the Judicial Inquiry and Investigation that was directed to be made by the aforesaid order of this Court dated January 21, 1957, the respondent, Albert Martin Cohen, in response to a subpoena served upon him, appeared before Mr. Justice George A. Arkwright, then presiding at the Additional Special Term of this Court, on October 28, 1958.
- 8. Except to acknowledge that he was admitted to practice law in December, 1922 in the Second Judicial Department, the respondent, Albert Martin Cohen, refused to answer all of the questions that were asked of him before the Additional Special Term on October 28, 1958 on the ground that the answers to the questions might tend to incriminate or degrade him. A complete and accurate transcript of the proceedings before the Additional Special Term on Octo-

ber 28, 1958 relating to the respondent, Albert Martin Cohen, is annexed hereto and marked Exhibit C.

9. Pursuant to a subpoena ad testificandum and a subpoena duces tecum, both served upon him on May 11, 1959, the respondent, Albert Martin Cohen, appeared with his counsel, David F. Price, Esq., before Mr. Justice Edward G. Baker presiding at the Additional Special Term of this Court, on May 19, 1959.

[fol. 10] 10. The aforesaid subpoena duces tecum served May 11, 1959 required respondent to produce:

"The following records pertaining to any action, claim or proceeding for damages for personal injuries or property damage on for death or loss of services resulting from personal injuries wherein you or the law firm of Cohen and Rothenberg accepted, during the period January 1, 1954 through December 31, 1958 inclusive, a retainer to act as attorney or of counsel for the plaintiff or claimant whereby your compensation or the compensation for the law firm of Cohen and Rothenberg for services rendered was to be contingent, in whole or in part, upon the successful prosecution or settlement of any such action, claim or proceeding:

- 1. (a) Day Book (reflecting daily receipts); (b) Cash Receipts Book; (c) Cash Disbursements Book; (d) Check Book Stubs; (e) Petty Cash Book; (f) Petty cash vouchers; (g) General Ledger and General Journal; (h) Canceled checks, bank statements, duplicate deposit slips of regular, personal and special checking accounts, open and closed; (i) Pass Books and evidences of accounts with all depositories other than check accounts, set forth above, such as savings bank, savings and loan association, postal savings, credit unions, etc.;
  - 2. All pleadings, records and other papers; and
- 3. All data and memoranda of the disposition of any such action, claim or proceeding including closing state-[fol. 11] ments required by Rule 4 of the Special Rules

Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department,"

- 11. On May 12, 1959, prior to the appearance of the respondent, Albert Martin Cohen, before the Additional Special Term, he was furnished with a copy of the aforesaid order of this Court made January 21, 1957 together with a copy of the amending order dated February 11, 1957. At the same time, copies of said orders were similarly furnished to the respondent's attorney, David F. Price, Esq.
- 12. (a) After being called as a witness to testify before the Additional Special Term on May 19, 1959 as aforesaid (s.m. 22611 et seq.), counsel for the Judicial Inquiry then offered and there was received in evidence the original Statements as to Retainers covering personal injury cases filed on behalf of or by the respondent, Albert Martin Cohen, in compliance with Rule 3 of the Special Rules of the Appellate Division for each of the years 1954 through 1958 inclusive (s.m. 22617-22619). The number of Statements as to Retainers filed in each of said years is:

1954 - 36	retainers	(Exhibit	1191).
1955 - 56	46.4	( "	1192).
1956 - 53	• •	( " ·	1193).
1957 - 49	• • • •	( ,	1194):
-1958 - 34	•	( / "	1195).

228 total retainers.

- [fol. 12] (b). During the same period 1954-1958, there was filed with the Appellate Division, Second Department, a total of 76 Statements as to Retainers in personal injury cases for or on behalf of the law firm of Cohen and Rothenberg comprising the respondent, Albert Martin Cohen and Louis I. Rothenberg, with offices at 16 Court Street, Kings County, New York. The originals of the 76 Statements as to Retainers were offered and duly received in evidence by the Additional Special Term (s.m. 22619-22620; Exhibits 1196 and 1197).
- 13. After the receipt in evidence of the Statements as to Retainers referred to in paragraph 12 (a) and (b) hereof,

the respondent, Albert Martin Cohen, was asked to produce the particular records enumerated in the subpoena duces tecum referred to and quoted in paragraph 10 above. The respondent was also asked a series of questions relating to his professional conduct. Among the questions thus asked of the respondent were the following:

- "Q. Mr. Cohen, do you have custody or possession of the records of those eases reflected in the statements of retainer that you filed with the Appellate Division for the years 1954 to 1958, inclusive, which were offered in evidence today!" (s.m. 22627)
- "Q. Do you have custody or possession of the records of the law firm of Cohen & Rothenberg for such statements of retainer that were filed during that period of 1954 through 1958?" (s.m. 22627)
- [fol. 13] "Q. Would you state, please, if a bank account was maintained during the period 1954 to 1958 for the law practice or affecting the law practice of Cohen & Rothenberg, and, if so, in what bank was such firm account maintained?" (s.m. 22628)
- "Q. " With respect to the statements of retainer that have been received in evidence earlier, did you ever employ an agent or a so-called runner to secure any of these claimants as your clients whose names are indicated in the statements of retainer!" (s.m. 22633)
- "Q. Mr. Cohen, did you ever pay or reward any member of the Police Department for referring or bringing to your office a claimant for personal injuries?" (s.m. 22634)
- "Q. For the same period during 1954 through 1958, did you ever pay or reward any court or prison employee for referring or bringing to your office a personal injury case?" (s.m. 22635)

- "Q. How about employees or any insurance or casualty companies during that same period, did you ever pay or agree to pay any such employees for referring or bringing cases to your office involving claims for personal injuries?" (s.m. 22635)
  - [fol. 14] "Q. A broad question then, sir, to encompass all categories: During that same period did you ever agree to pay, and did you pay, any laymen for referring or bringing personal injury cases to your office?" (s.m. 22635-22636)
  - "Q. Did you ever make any cash advances to any lay person as an inducement to refer personal injury cases to your office with a promise that upon any settlement or recovery of any such personal injury case, that lay person would be paid by you an amount equal to 10 per cent of the recovery or settlement?" (s.m. 22636)
- "Q. Were any personal injury cases ever referred to you or to your office by an Al Frangello?" (s.m. 22636)
- "Q. Did you ever make any payments or agree to pay or reward a person named Al Frangello, a layman, for referring personal injury cases to you, sir?" (s.m. 22636)
- "Q. More specifically. Did a Tom Connolly ever refer any personal injury cases to your office?" (s.m. 22637)
- "Q. Did you ever make any payments or agree to pay, directly or indirectly, one Tom Connolly as a reward for referring personal injury cases to you, sir!" (s.m. 22637)
- 14. Precisely the same questions as those quoted immediately above, except as to change of name, were put to

[fol.15] the respondent, Albert Martin Cohen, with respect to other and different individuals named Joe Marcus, Albert Gaetani, Abe Kaplan, Clifford Bass, Antonio Pecorino, and another individual, identified merely as "Smithy" or "Smitty" (s.m. 22637-22641). Among the questions thus asked of the respondent are the following:

"Q. Do you know the place of employment of Clifford Bass whom I referred to a moment ago?" (s.m. 22638)

"Q. Would this refresh your recollection, and what would your answer be as to whether he was employed in one of our City Hospitals?" (s.m. 22638)

"Q. Did you ever have occasion to draw your individual check from your law office account, but in your individual name, to represent, or the proceeds of which went to any of the individuals whose names I have just mentioned as part of a reward or payment for referring a personal injury case to your office?" (s.m. 22639)

"Q. Would your answer be the same with respect to any checks that may have been drawn on the firm account or partnership account, if one there be, of Cohen & Rothenberg, involving any of these individuals?" (s.m. 22639)

[fol. 16] "Q. More specifically, were any checks, either your individual account or the firm account of Cohen & Rothenberg, marked 'Disb' as the abbreviation for disbursement, the proceeds of such checks having been received by these individuals and charged as a disbursement against the particular cases referred by these individuals?" (s.m. 22639)

"Q. Mr. Cohen, did you ever engage the services of so-called claims adjusters, non-lawyers, to settle any of

your personal injury cases with insurance companies and casualty companies?" (s.m. 22640)

- "Q. More particularly with respect to the very claims or cases identified by the names of the clients reflected in the statements of retainer received in evidence here today, did you ever engage the services of an adjuster or a so-called ten percenter to settle any of those particular cases with insurance companies or casualty companies?" (s.m. 22640)
- "Q. Did you ever make any payments to any so-called adjusters or ten percenters for effecting any settlement or disposition of a personal injury case?" (s.m. 22640)
- "Q. Mr. Cohen, I preface this question again by saying that if you wish to refer to the statements of retainer that were received in evidence today, I would be glad to give you the opportunity to do so. I want [fol. 17] to ask you with relation to those statements of retainer, have you in each instance truthfully set forth the names or identity of the so-called referrers of the particular cases indicated in the statements of retainer?" (s.m. 22640-22641)
- 15. The respondent, Albert Martin Cohen, was then asked a number of questions as to the circumstances involving the referral of a personal injury case to him by Louis I. Rothenberg involving a client or a claimant named Patrick McCormack. The said claimant was the subject of a Statement as to Retainer No. 41 filed during the calendar year 1955 by the respondent (s.m. 22641-22644-A).
- 16. The respondent, Albert Martin Cohen, refused to produce any of the records set forth in the subpoena duces tecum quoted in Paragraph 10 above, upon the ground that the production of such records might tend to incriminate or degrade him.
- 17. The respondent, Albert Martin Cohen, refused to answer the questions quoted in Paragraphs 13 and 14 above

upon the ground that the answers to such questions might tend to incriminate or degrade him. For similar reasons the respondent refused to answer the questions referred to in Paragraph 15 above.

- 18. After a brief recess, respondent, Albert Martin Cohen, was advised of the possible serious consequences that might flow from his refusal to answer, as aforesaid, the questions that were propounded to him (s.m. 22649 [fol. 18] et seq.); and that respondent's failure to answer "may well give rise to disciplinary action" (s.m. 22655). The respondent was also apprised of pertinent statutory provisions contained in the Judiciary Law and the Penal Law and of particular Canons of Ethics "because they encompass matters that are within or contemplated by the very questions put to you today", and that "Subdivision 2 of Section 90 of the Judiciary Law vests the Appellate Division with power and control over attorneys practicing law in this Department and the Appellate Division is authorized to mete out appropriate disciplinary punishment for anyone proved guilty of professional misconduct or any conduct prejudicial to the administration of justice". (s.m. 22650, 22651 et seq.)
- 19. Following the reference to the pertinent provisions aforesaid and before he was excused from the witness stand, the respondent, Albert Martin Cohen, was given a further opportunity by Mr. Justice Baker to answer the questions that had been asked of him. The respondent, however, stated that his answers to the questions if again propounded, would be the same (s.m. 22659).
- 20. The complete transcript of the proceedings had before the Additional Special Term on May 19, 1959 as aforesaid, is annexed hereto and made a part hereof, marked Exhibit D.
- 21. Thereafter and on June 8, 1959, Mr. Justice Baker filed with this Court the aforesaid transcript of the proceedings had before him (Exhibit D annexed hereto), together with his report embodying a recommendation that discifol. 19] plinary proceedings should be instituted against the respondent, Albert Martin Cohen.

- 22. Thereafter, and on June 22, 1959 this Court made an order (Exhibit A annexed hereto) designating and directing your petitioner to institute in this Court disciplinary proceedings against the respondent, Albert Martin Cohen.
- 23. The refusal of the respondent, Albert Martin Cohen, to produce the records set forth in the subpoena duces tecum quoted in Paragraph 10 above, and his refusal to answer the questions quoted and referred to in Paragraphs 13, 14 and 15 above, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court: such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession.
- 24. Accordingly, by reason of the premises, the respondent; Albert Martin Cohen, as an attorney and counselorat-law, is hereby charged with professional misconduct and conduct prejudicial to the administration of justice.
- 25. That no previous application has been made for the relief herein asked.
- [fol. 20] 26. That the sources of petitioner's knowledge and the grounds of his belief are the facts set forth in the testimony and exhibits taken and adduced before the Hon. George A. Arkwright on October 28, 1958 (Exhibit C annexed hereto) in said Judicial Inquiry and Investigation conducted by him, and in the testimony and exhibits taken and adduced before the Hon. Edward G. Baker on May 19, 1959 (Exhibit D annexed hereto) in said Judicial Inquiry and Investigation conducted by him.
- 27. That an order to show cause is asked for herein, instead of service of a notice of motion, in order that the

Court may be fully apprised of the charges made against the respondent, Albert Martin Cohen, in advance of the service thereof upon him, and to enable this Court to fix the return date of the order to show cause, all in accordance with the practice observed in such matters.

Wherefore, petitioner prays that an order may issue to the respondent, Albert Martin Cohen, directing that he show cause before this Court why an order should not be made herein directing that respondent, Albert Martin Cohen, be disciplined upon the charges set forth herein, and for such further action as may be contemplated by Section 90 of the Judiciary Law of the State of New York, in accordance with the practice directed to be observed in the disposition of such matters by the Courts of this State.

Dated: Brooklyn, New York, July 9, 1959.

Denis M. Hurley, Petitioner.

(Verified by Denis M. Hurley on July 9, 1959.)

[fol. 21]

EXHIBIT A, ANNEXED TO PETITION

#### SUPREME COURT

APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY THE COURT INTO
CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE
ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS AT LAW AND BY OTHERS ACTING IN CONCERT WITH
THEM, IN THE COUNTY OF KINGS.

#### ORDER DESIGNATING COUNSEL

An order having been made by the Appellate Division of the Supreme Court, Second Judicial Department, dated

January 21st, 1957, as amended by order dated February 11th, 1957, directing that a judicial inquiry and investigation be made (1), with respect to the alleged improper practices and abuses by attorneys and counselors at law in Kings County, and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association, verified December 11th, 1956; (2), with respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions; (3), with respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor. . by attorneys and by others acting in concert with them; (4), with respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in [fol. 22] concert with them, and said order, as amended, having further directed that such inquiry and investigation be conducted by the Honorable George A. Arkwright a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, and the said Justice George A. Arkwright having retired by reason of the age limit, and the Honorable Edward G. Baker, a Justice of the Supreme Court, Second Judicial District, having been designated in place of said Justice George A. Arkwright, and it appearing that the said Honorable Edward G. Baker has taken testimony and filed in this court on June 8th, 1959, an intermediate report based upon said testimony, together with said testimony, which report indicates and advises that disciplinary proceedings be taken against attorney Albert Martin Cohen, and pursuant to Section 90 of the Judiciary Law, it is

Ordered, that Denis M. Hurley, Esq., an attorney, is hereby designated and directed to institute in this court disciplinary proceedings against attorney Albert Martin Cohen (admitted December 6th, 1922, Second Judicial Department), based on his misconduct as indicated in the intermediate report of Mr. Justice Edward G. Baker filed June 8th, 1959, and as indicated in the evidence and exhibits adduced in said judicial inquiry and investigation, or any other evidence that may be available, and that such dis-

ciplinary proceedings be instituted and prosecuted as soon as may be practicable.

Dated: Kings County, N. Y., June 22, 1959.

GERALD NOLAN
Presiding Justice,
Appellate Division, Supreme Court,
Second Judicial Department.

[fol. 23]

#### EXHIBIT B, ANNEXED TO PETITION

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.

Present:

HON. GERALD NOLAN,

Presiding Justice,

- " · HENRY G. WENZEL, JR.,
- " GEORGE J. BELDOCK,
- " CHARLES E. MURPHY,
- " HENRY L. UGHETTA,

Associate Justices.

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO
CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS
AT LAW AND BY OTHERS ACTING IN CONCERT WITH THEM
IN THE COUNTY OF KINGS.

A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in confol. 24] duct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

Now, THEREFORE, pursuant to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

ORDERED, that a judicial inquiry and investigation be and they hereby are directed to be made:

- (1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;
- (2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;
- (3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and
- (4) With respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them; and it is further

ORDERED, that such inquiry and investigation shall be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the at-[fol. 25] tendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

ORDERED, that, for the purpose of conducting said inquiry and investigation, An Additional Special Term of the Supreme Court, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice George A. Arkwright, be and he hereby is assigned to hold such Special Term; and it is further

ORDERED, that Denis M. Hurley; Esq., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7), it is further

Ordered, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall [fol. 26] be made public or otherwise divulged until the further order of this court; and it is further

Ordered, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

ENTER:

Gerald Nolan,

Presiding Justice.

[fol. 27]

#### EXHIBIT B, ANNEXED TO PETITION

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 11th day of February, 1957.

Present:

Hon. Gerald Nolan,

Presiding Justice,

- " HENRY G. WENZEL, JR.,
  - GEORGE J. BELLOCK,
- " CHARLES E. MURPHY,
- " HENRY L. UGHETTA,

Justices.

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO
CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY THE ATTORNEYS AND COUNSELORS AT LAW AND BY OTHERS ACTING IN CONCERT WITH
THEM, IN THE COUNTY OF KINGS.

#### ORDER AMENDING ORDER

On the Court's own motion the order of this court dated and entered January 21st, 1957, is hereby amended by deleting therefrom the third ordering paragraph and substituting therefor the following:

[fol. 28] "Ordered, that, for the purpose of conducting such inquiry and investigation, An Additional Special Term of the Supreme Court, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22nd, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned

to preside at such Additional Special Term may deem advisable, and that Mr. Justice George A. Arkwright, be and he hereby is assigned to hold such Additional Special Term, and it is further"

ENTERN

GERALD NOLAN,
Presiding Justice.

[fol. 29]

EXHIBIT C. ANNEXED TO PETITION

Testimony of

ALBERT MARTIN COHEN

before the

ADDITIONAL SPECIAL TERM

on

Остовев 28, 1958

Mr. Donlan: Your Honor, the next matter is the matter of Albert Martin Cohen, an attorney with offices at 16 Court Street, Brooklyn, New York. We served a subpoena duces tecum on him and he is represented by David Price, an attorney, who appears for him this afternoon. I believe, although I am not sure, Mr. Cohen is also here.

The Court: All right. We will take that one next. Mr. Price: I appear for Albert Cohen. I will be outside.

The Court: All right.

ALBERT MARTIN COHEN, 385 East 18th Street, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

The Court: Mr. Cohen, you are an attorney-at-law, I know. Were you admitted to practice in this Department?

The Witness: Yes, your Honor. [fol. 30] The Court: When was that?

The Witness: December, 1922.

The Court: I will go through the same procedure with you as I do with every attorney who is called to the stand. This is the Order of January, 1957, instituting this investigation. You may not have seen it. It is a certified copy. If you would like to look it over, take your time. The Ordered part is the important part.

(Witness examines document.)

You will note that the Order sets up an Inquiry and investigation over which I am to preside and Mr. Hurley is counsel, and that it is secret. You will also note that there are no respondents, no defendants, nobody is being called as such or as a prospective defendant or respondent. We allow counsel and you have counsel. He has been here many times so he is familiar with what we do. He is not allowed in the room during the time of the interrogation. He is allowed to stay outside where I believe he is now. If at any time you feel you need to consult with him or if you want to consult with him, let me know and we will suspend and you may go out and consult with him.

The Witness: All right.

The Court: If there is any question you want to ask feel free to do it. Is there anothing you want to state or ask about at the present time?

The Witness: No, your Honor.

[fol. 31] The Court: All right, Mr. Donlan.

#### By Mr. Donlan:

Q. Mr. Cohen, as I understand it, you are here in answer to a subpoena duces tecum which was served on you on the 17th of September, 1958, for the production of your records for the period—I will read it, perhaps, your Honor, and get the record clear.

The Court: All right.

Q. (Continuing) For the production of the following records pertaining to your business as an attorney and the business of the law firm of Cohen & Rothenberg for the period January 1, 1953 through December 31, 1957. It lists the records. Mr. Cohen, have you these records with you today?

The Witness: Upon advice of counsel I respectfully decline to produce such records upon the ground that the production of such books, records, papers, or other data may tend to incriminate or degrade me and/or expose me to a penalty or forfeiture, and on the further ground that the production of said records would be in violation of my constitutional rights and would compel me to be a witness against myself in violation of my constitutional rights, and further would amount to an unlawful search and seizure in violation of my constitutional rights.

Mr. Donlan: Your Honor, at this time I would like [fol. 32] to introduce in evidence the subpoena duces tecum served on Mr. Albert Martin Cohen by Wil-

liam J. Fuhry of this office.

The Court: That is received in evidence, 845.

(Received in evidence and marked Exhibit 845.)

#### By Mr. Donlan:

Q. Mr. Collen, are you at the present time in a partnership or agreement of any kind with Mr. Rothenberg?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, do you know whether or not Mr. Rothenberg is presently in Brooklyn or in the City of New York?

The Witness: Upon advice of my counsel I respectfully decline to answer the question on the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, is it your position that no matter what question I pose to you that you will answer as you have answered these questions, that you will refuse to answer, as you say, substantially on the ground that it may tend to incriminate you?

[fol. 33] The Witness: Well, may I consult my counsel on that question!

The Court: By all means.

The Witness: Will you repeat that again?

Mr. Donlan: I will have the stenographer read it back.

(The last question was read by the reporter.)

. The Court: All right, Mr. Cohen. Step out. Take your time.

(Mr. Cohen left the courtroom and later returned.)

The Court: Repeat the question, please, to Mr. Cohen.

(The same question was read to Mr. Cohen.)

The Witness: Your Honor, after consulting with counsel, the question put to me is entirely too broad and I cannot answer it unless specific questions are put to me.

The Court: In other words, I judge from that your

answer is no?

The Witness: Well, my answer is, your Honor, that a I cannot answer the question because it is too broad.

The Court: It doesn't seem to be broad. It is pretty clear. Read it again.

Mr. Donlan: Your Honor, I can be more specific.

[fol. 34] The Court: All right. Go ahead.

Mr. Donlan: I was just attempting to shorten the process, that is all.

The Court: As I understand it, your question essentially is this: The Fifth Amendment has been pleaded to every question that is asked, and if you ask any other question will you get the same answer; isn't that the question.

Mr. Donlan: That is what I intended by the ques-

tion, but it may appear too broad, your Honor.

The Court: That is what I understand. In other words, there is no use keeping you here, Mr. Cohen, for hours when we can shorten it if you are going to make the same answer.

#### By Mr. Donlan:

Q. Mr. Cohen, have you used laymen in the capacity of so-called public adjusters or 10-percenters in your practice?

The Witness: Upon advice of counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, have you paid laymen who solicited cases for you?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the [fol. 35] ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, do you have control of the records of the law firm of Cohen & Rothenberg?

The Witness: Upon advice of counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, if I direct any further questions to you relative to your practice as an attorney, will you answer any of those questions or will you answer the questions I put to you as you have answered all the questions so

far put to you refusing to answer and claiming substantially your privilege against self-incrimination!

The Witness: Your Honor, there again I believe the question is too broad for me to be able to answer it in its form.

The Court: All right. Go ahead, Mr. Donlan.

Q. Mr. Cohen, have you paid individuals any money or moneys for sending cases to you while you were practicing law?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

[fol. 36]. Q. Mr. Cohen, have you given advances to clients in the conduct of your practice as an attorney?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, have you in the conduct of your practice as an attorney referred or sent clients to doctors?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Mr. Donlan: In view of the fact that the witness has responded substantially that he refuses to answer on the grounds that the questions I put to him so far may tend to incriminate him, I see no point in further questioning this witness at this time, your Honor.

The Court: That is all, Mr. Cohen. Mr. Donlan: Thank you, Mr. Cohen.

(Witness excused.)

[fol. 37]

#### EXHIBIT D, ANNEXED TO PETITION

Testimony of
ALBERT MARTIN COHEN
before the

ADDITIONAL SPECIAL TERM

on

May 19, 1959

(Albert Martin Cohen and his counsel, David Price, entered the courtroom.)

## MOTION TO STRIKE SUBPOENA DUCES TECUM AND DENIAL THEREOF

Mr. Price: May it please your Honor, on behalf of the witness, who was served with a subpoena duces tecum returnable today, I move to vacate the subpoena duces tecum herein on the ground that it is invalid and that it does not meet the statutory requirements of Sections 750 and 753 of the Judiciary law of the State of New York.

- 2. That the subpoena duces tecum herein is invalid as a matter of law on the ground of the quantity of the matter called for and the period of time referred to herein, and in violation of Article 1, Section 6 of the New York State Constitution, and the Fourth and Fourteenth Amendments to the Constitution of the United States.
- 3. That the subpoena duces tecum herein is invalid as a matter of law because it may compel the witness to give answers and/or produce records which may tend to incrimi-[fol. 38] nate or degrade him in violation of Article 1, Section 6, of the New York State Constitution, and the Fourth and Fourteenth Amendments to the Constitution of the United States.
- 4. That the subpoena duces tecum here n is invalid as a matter of law for failure to particularize the cases con-

cerning which information and/or records of the petitioner are demanded.

5. That the subpoena duces tecum herein is invalid as a matter of law in violation of the constitutional privilege against unreasonable searches and seizures by calling for matters not shown to be relevant to the investigation.

Those are substantially the grounds urged before your. Honor on the other matters that are still pending before

your Honor.

The Court: Yes.

Mr. Castaldi: As Mr. Price concluded, the grounds that he has now urged to vacate the instant subpoenas are the grounds similarly urged upon your Honor to vacate sub-

poenas in other proceedings.

I think the law has at least up to this moment been definitely established by our State Courts, and more particularly in proceedings involving Anonymous No. 2 and Anonymous No. 14, reference to those proceedings having been made during the course of prior proceedings at which Mr. Price was present.

The Court: You are familiar with the form of subpoenas

in Anonymous Nos. 2 and 14, are you not?

Mr. Price: Yes, your Honor, I am.

[fol. 39] The Court: My recollection is that they are practically identical in form with that which was served in this instance. Am I not right?

Mr. Price: While I haven't compared them, from a quick, casual look, it is my conclusion that your Honor is

correct.

Mr. Castaldi: Without seeking to labor the point, your Honor, if anything the scope and definiteness of these subpoenas are more circumscribed, if I may put it that way, and more pinpointed than even the other subpoenas which have been upheld, in that they relate to a specific period, January 1, 1954 through 1958, and with relation in particular to statements of retainer filed with the Appellate Division in compliance with Rule 3 of the Rules of the Appellate Division by Albert Martin Cohen or the firm of Cohen & Rothenberg, of which Mr. Cohen is a partner.

The Court: I see. Do you have a copy of the subpoena

duces tecum!

Mr. Castaldi: Yes, I do, sir. I have the originals, your Honor. Those are photostats. (Handed the Court.)

The Court: These clearly are limited and certainly are less general in form than those with which the Court was concerned in Anonymous 2 and Anonymous 14. It is clear that these relate only to the business records, the records kept by Mr. Cohen in the course of his business, pertaining to any action, claim for damages, and so forth. No, I am prepared to rule now on that. I will deny it with an appropriate exception.

Mr. Price: Yes, your Honor. May I state off the record,

please-

(Discussion off the record.)

[fol. 40] Albert Martin Cohen, recalled as a witness, having been previously sworn, testified further as follows:

Mr. Castaldi: I take it it will be conceded—it might not be entirely necessary—that on the prior occasion that you were sworn, it carries and has the same effect.

Mr. Price: There is no doubt about it, in my opinion.

Mr. Castaldi: I do not know the particular status of the proceeding, as far as his last appearance is concerned, and that was in October, 1958. I wanted, in any event, to make certain that we are in accord that the witness is being deemed to be under oath today and sworn.

Mr. Prico: That is correct.

The Court: Surely.

Mr. Castaldi: Mr. Cohen, you are here pursuant to a personal subpoena dated May 11, 1959, and served upon you the same day, May 11, 1959, together with a subpoena duces tecum similarly dated May 11, 1959 and served upon you May 11, 1959.

For the purpose of the record I should like to

offer in evidence both of these subpoenas.

Mr. Price: No objection. I concede it, your Honor, that they were both served on him. I don't see any purpose in offering them other than that. If he wants them I have no objection.

Mr. Castaldi: Yes, I should like to make them part of the record.

[fol. 41] (Received in evidence and marked Exhibits 1188 and 1189, respectively.)

Mr. Castaldr: To save time, Mr. Cohen, I show you this copy of a letter dated May 12, 1959, addressed to your attorney, Mr. Price, from me, and ask—

Mr. Price: Let me see it. I will give you an answer. (Handed counsel.) I received that and received the enclosures.

Mr. Castaldi: Similariy, I should like to ask-

Mr. Price: And he received the enclosures therein mentioned.

Mr. Castaldi: And the copy of that letter?

Mr. Price: Yes.

Mr. Castaldi: May I have the letter marked in evidence, please?

(Received in evidence and marked Exhibit 1190.)

Mr. Castaldi: Mr. Cohen, I think you are entitled to know why you have been subpoenaed to appear here today. With my letter of May 12, 1959, which has just been received in evidence as Exhibit 1190, there was enclosed a copy of the Order of the Appellate Division of January 21, 1957, together with the Order of the so-called Amending Order dated or made February 11, 1957. You have had an opportunity, I assume, to read, study, the provisions of that Order.

The Witness: I read it.

[fol. 42] Mr. Castaldi: And more particularly I want to point out, Mr. Cohen, the provisions of that Appellate Division Order of January 21, 1957, whereby there was ordered this Judicial Inquiry and investigation to be made with respect to alleged improper practices and abuses by attorneys in Kings County and by persons acting in concert with them.

I am referring now to the provision marked in parenthesis No. 1, and followed by provision No. 2 with respect to alleged corrupt and unethical practices, including the practice of solicitation, in obtaining retainers and in the subsequent prosecution and disposition of the claims and actions with respect to practices involving professional misconduct and with respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them.

I do not here charge you—I say I; you will forgive the 'personal pronoun—with any of the practices enumerated in the Order. I am merely reciting themto indicate to you the scope of this Judicial Inquiry

and investigation.

Then you will note also, Mr. Cohen, that the Additional Special Term now represented by his Honor, Judge Baker, is to make and file with the Appellate Division his report setting forth the proceedings before him, together with his findings and his recommendations.

That, in brief, is the essence of this Order, which I mentioned to indicate, as I say, the basis and scope

of the inquiry.

[fol. 43] Mr. Price: We will concede that my client is more or less, as are all lawyers, in duty bound to know the scope of the Inquiry ordered by the Appellate Division, and I so concede it.

Mr. Castaldi: Thank you, sir.

Perhaps it would be well, by way of preliminary, Mr. Cohen, to questions that I shall put to you shortly, to point out, and as your attorney undoubtedly also knows and has probably advised you, that this Inquiry is not an adversary proceeding. You are not a defendant or a respondent in any sense at this time. You are not now being charged with anything, as I said a moment ago, in the Inquiry at this time, and the Inquiry at this juncture seeks merely to ascertain pertinent facts from you that are within the scope of the Inquiry that bear on or relate to your professional conduct. And very frankly, we have information that indicates your participation in professional misconduct, and I want

to afford you the opportunity today to make such answers to questions that I may put to you. If you and your counsel are satisfied that these questions that I shall put to you are relevant and pertinent to the Inquiry, and do bear upon your professional conduct, it is in that light that I am going to propound various questions to you.

You are represented here by able counsel, Mr. Price. It is the policy, if I may presume at the moment to speak for his Honor, Judge Baker, to afford you the privilege of counsel. I do not believe the con[fol. 44] stitutional law grants you that as a matter of right, but in keeping with Judge Baker's policy,

you are permitted to have counsel present.

I want you to feel completely free to confer at any stage of this interrogation with Mr. Price for such advice as you may wish to obtain from him, and similarly, Mr. Price, I don't want you to hesitate, if you feel at any appropriate time you ought to consult with your client on matters of law or constitutional questions, if any arise, without, of course, interrupting the interrogation proper, I want you, in turn, to feel completely free to confer with your client.

Mr. Price: I might say Judge Baker has very kindly advised me of my rights when I first appeared here with another lawyer, so I think I understand, and I think he understands my position.

The Court: Right.

Mr. Castaldi: Thank you. I suffer from lack of lengthy association with the Inquiry, Mr. Price.

Is there any question, Mr. Cohen, that you should like to ask, or any statement you would like to make before proceeding with my questioning?

The Witness: I have no statement to make.

Mr. Castaldi: If the Court please, for purposes of record and again as a basis for some of the questions to follow, I should like to have marked for purposes of reference and deemed part of the record various statements of retainer filed, first in behalf of or by [fol. 45] Mr. Cohen in compliance with Rule 3 of the Special Rules of the Appellate Division, and first

the statements of retainer for the year 1954 thus filed in compliance with Rule 3 with the Appellate Division, Second Department, by or on behalf of Mr. Cohen, and my arithmetical count for such retainers for the year 1954 is thirty-six, although I want to point this out: By some circumstance we have only the retainers Nos. 20 to 36. The first 19 retainers are missing. I think that some time ago they were utilized in or by some other forum, and at the moment they are not available in the Appellate Division. I just wanted to make that explanation. But I shall seek to be careful and not ask any questions with relation to the missing, so-called missing retainers Nos. 1 to 19 for the year 1954.

(Received in evidence and marked Exhibit 1191.)

Mr. Castaldi: Similarly for the purposes of reference and to be deemed part of the record, I want to offer and have marked the original retainers or statements as to retainers in compliance with the same Rule 3 filed with the Appellate Division by or on behalf of Albert Martin Cohen for the calendar year 1955, numbered 1 to 56, inclusive, and therefore aggregating 56 retainers for the year 1955.

(Received in evidence and marked Exhibit 1192.)

[fol. 46] Mr. Castaldi: I next offer the original retainers filed with the Appellate Division, Second Department, in compliance with the same Rule 3 during the calendar year 1956, statements as to retainers Nos. 1 to 53, aggregating 53 retainers filed by or on behalf of Mr. Cohen.

(Received in evidence and marked Exhibit 1193.)

Mr. Castaldi: Next, your Honor, statements as to retainers filed with the Appellate Division, Second Department, by or on behalf of Mr. Cohen, during the calendar year 1957, marked Nos. 1 to 49, inclusive, aggregating 49 original statements of retainer.

(Received in evidence and marked Exhibit 1194.)

Mr. Castaldi: For the calendar year, or during the calendar year 1958, there were filed by or on behalf of Mr. Cohen original statements of retainer with the Appellate Division, Secondar Department, numbered 1 to 34, inclusive. I ask that these original statements be received.

(Received in evidence and marked Exhibit 1195.)

Mr. Castaldi: Your Honor, next I offer in evidence to be marked for purposes of reference and part of [fol. 47] this record original statements as to retainers filed with the Appellate Division during the calendar year 1954, comprising 33 such statements and numbered 1 to 33, inclusive, filed by or on behalf of Albert Martin Cohen and Louis I. Rothenberg, attorneys, 16 Court Street.

(Received in evidence and marked Exhibit 1196.)

Mr. Castaldi: With respect to the same attorneys, Albert Martin Cohen and Louis I. Rothenberg, attorneys, 16 Court Street, I now offer the original statements of retainer filed with the Appellate Division, Second Department, during the calendar year 1956, numbered 1 to 43, inclusive.

(Received in evidence and marked Exhibit 1197.)

Mr. Castaldi: Your Honor, I might make the observation that all of these statements of retainer are in conformity, timewise, with the period specified in the subpoenas that were introduced in evidence to-day, served upon Mr. Cohen.

# By Mr. Castaldi:

Q. Mr. Cohen, from the testimony that you previously gave before this Additional Special Term on October 28, 1958, I note that you were admitted to the practice of law in the Second Judicial Department in December, 1922. Is that correct, sir? A. That is correct.

[fol. 48] Q. Do you now maintain an office for the prac-

tice of law? A. I do.

Q. Where, please? A. 16 Court Street, Brooklyn.

Q. How long have you maintained an office at that address? A. It is a long time. I am trying to remember.

Q. Well, approximately. I am not going to ask you to be precise on questions of that kind. A. About—over fifteen years.

Q. Approximately fifteen years? A. I think it is more.

Q. All right. Have you maintained during that time an office at any other address than 16 Court Street? A. At 26 Court Street.

Q. I mean during this period. A. No.

Q. Only at that address? A. That is right.

Q: During that period of time have you practiced law individually or at any time did you practice in association with or in partnership with any other lawyer, or lawyers?

The Witness: May 1 consult with Mr. Price? The Court: Of course.

Mr. Price: Assert your privilege. It is my advice to you to assert your constitutional privilege.

The Court: You may consult with Mr. Price at any time during the questioning, in private or otherwise.

The Witness: Thank you.

The Court: Surely.

Mr. Price: I think, in order to expedite it, that I might indicate to him what I desire him to do. I just did.

[fol. 49] The Court: All right.

The Witness: I don't understand you."

Mr. Price: Assert your constitutional privilege.

The Witness: Acting upon the advice of my counsel, your Honor, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me, and may tend to expose me to a penalty or forfeiture, and I rely on the privileges accorded to me under the New York-State and Federal Constitutions.

## By Mr. Castaldi;

Q. Mr. Cohen, how many employees do you have in your law office at this time?

Mr. Price: The same.

The Witness: Well, upon the advice of my counsel, your Honor, I respectfully decline to answer any questions, answer this question, upon the ground—

Mr. Price: You may say on the same ground.

The Court: Yes, I was going to suggest, too, that perhaps we can shorten the answer.

The Witness: Upon the same ground as I pre-

viously indicated.

Mr. Castaldi: It being understood that thereby the answer that you initially gave, whereby you invoked your constitutional privilege, shall be deemed to apply with the same scope, force and effect, then? [fol. 50] Mr. Price: Yes.

Mr. Castaldi: To such questions as you may assert or invoke your privileges, is that correct?

Mr. Price: That is correct.

#### By Mr. Castaldi:

Q. During the last ten years have you practiced law in association—I think I may have asked you this, but I will make it more specifically—Mr. Cohen, during the last ten years have you at any time during that period practiced law in association with or in partnership with one Louis Rothenberg at 16 Court Street, Brooklyn!

The Witness: My answer is the same as the answers to the previous questions, your Honor, on the advice of counsel.

Mr. Castaldi: There again, so that there will be no chance for any misunderstanding, it is with respect to his invoking his constitutional privilege that he first gave?

Mr. Price: That is right.

The Court: In the event the answer is the same to any questions that may follow, it is understood that the answer will be identical in form to the answer given to the first question propounded to the witness.

Mr. Price: Wherein he invoked his constitutional privileges under the Constitution of the State of New York and under the Federal Constitution and the amendments thereto, without specifically pointing them out.

The Court: Yes.

[fol. 51] Mr. Price: That is correct, sir.

Mr. Castaldi: No, I take issue a little bit, You say "without pointing them out." I do insist sir, most respectfully, that you do point out which privileges of the Constitution you rely upon. Is it the privilege tending to incriminate?

Mr. Price: Section 6, Article 1 of the New York State Constitution, and I think it is the Fifth Article of Amendment to the Constitution of the United States and the Fourteenth Article of Amendment to the Constitution of the United States.

Mr. Castaldi: And Mr. Cohen adopts those particular provisions of the State and Federal Constitutions?

Mr. Price: That is correct, sir.

The Court: I think the record is clear.

Mr. Castaldi: Yes.

#### Br. Mr. Castaldi:

Q. Mr. Cohen, is not the name of Louis I. Rothenberg now on the entrance door to your offices at 16 Court Street, Brooklyn?

Mr. Price: Same answer.

The Witness: My answer is the same as I have previously indicated, your Honor.

Mr. Price: And I might state to your Honor, it is counsel's view that the United States Supreme Court in a rather recent decision says that we must claim our privilege all the way, otherwise we waive it if we answer any questions, and with that in view he is taking my advice.

[fol. 52] Mr. Castaldi: Similarly, I feel duty bound as an attorney to propound a series of these questions, even though there is indication that the elient may invoke the privilege,

Mr. Price: Yes, you do anything you want to. I sha'n't do anything to impede you if I can help it.

## By Mr. Castaldi:

Q. Mr. Cohen, I refer you to the subpoena duces tecum marked in evidence today as Exhibit 1189 and ask you, sir, if you have produced the particular records called for by that subpoena duces tecum?

Mr. Price: Invoke your constitutional right.

The Witness: Well, acting upon the advice of my counsel, your Honor, I respectfully decline to produce any of these records, upon the ground that the production of any books, records, papers, or any other data may tend to incriminate or degrade me and/or expose me to penalty or forfeiture, and on the further ground that the production of said records would be in violation of my constitutional rights and would compel me to be a witness against myself in violation of my constitutional rights, and further would amount to an unlawful search and seizure in violation of my constitutional rights. And I also decline upon all of the grounds stated by my counsel on his motion to vacate the subpoena duces tecum. And again I [fol. 53] rely upon the privileges accorded to me under the New York State and Federal Constitutions. and the particular sections and amendments thereof as stated by my counsel.

Mr. Castaldi: Your Honor, among the grounds asserted by the witness in his answer was that of unlawful search and seizure. So that we can define the precise issues here, do I understand from your Honor's ruling at the outset of this hearing today on the motion made by Mr. Price to vacate the subpoenas, wherein he asserted unlawful search and seizure, that that ground is overruled by your Honor?

The Court: Correct.

#### By Mr. Castaldi:

Q. Mr. Cohen, do you have custody or possession of the records of those cases reflected in the statements of retainer that you filed with the Appellate Division for the years 1954 to 1958, inclusive, which were offered in evidence today?

Mr. Price: The same position.

The Witness: My answer is the same as I have previously indicated, if your Honor please.

Q. Do you have custody or possession of the records of the law firm of Cohen & Rothenberg for such statements of retainer that were filed during that period of 1954 through 1958?

The Witness: My answer is the same as previously indicated.

[fol. 54] Q. In connection with your law practice, and more particularly confined to the period of 1954 through 1958, would you state, please, if you maintained a bank account in your individual name, for your law practice, and in what bank was your account so maintained?

Mr. Price: Same answer.

The Witness: My answer is the same as previously indicated, your Honor.

Mr. Price: Just say same answer. Shorten it, please.

Q. Would you state, please, if a bank account was maintained during the period 1954 to 1958 for the law practice or affecting the law practice of Cohen & Rothenberg, and, if so, in what bank was such firm account maintained?

The Witness: Same answer. .

Q. Were any records affecting your law practice, and more particularly affecting the cases that are indicated in the statements of retainer for the period 1954 through 1958—have any such records been destroyed?

The Witness: Same answer,

Q. With respect to comparable records with respect to the law firm of Cohen & Rothenberg for the same period of 1954 to 1958, have any such records been destroyed?

The Witness: Same answer, your Honor.

[fol. 55] Q. In this connection I assume Mr. Cohen, you are mindful that Rule 5 of the Special Rules of the Appellate Division requires an attorney to preserve all papers for a period of at least five years after the disposition of a contingent fee claim for a case for which you have filed a statement of retainer. Are you familiar with that rule, sir?

Mr. Price: I submit, your Honor, it is immaterial whether he is familiar with it or not. We are all charged with it, whether we are familiar or not.

Mr. Castaldi: I think scienter may be important. The Court: It may be. I think it is a proper question.

Mr. Price: Then give your answer, if you are familiar with the rule.

#### A. I know that to be so.

Q. Frankly, it was in the light of that rule, Mr. Cohen, that I asked you whether the records in question were in your custody or possession or have been destroyed?

Mr. Price: Same answer.

The Witness: Well, he hasn't asked me a question. He just made a statement.

Q. In the light of that specific provision or requirement of in Rule 5, is your answer to the previous questions regarding the existence or destruction of any records, without my charging you with destruction of the records, sir, by those questions, is your answer the same? A. I don't quite [fol. 56] get the question. Would you mind repeating it? It is a very lengthy question.

Q. In the light of my specific reference, sir, to the requirements of Rule 5 of the Special Rules of the Appellate Division— A. Now I have it, You don't have to repeat it.

Q. All right, sir.

The Witness: My answer, your Honor, if I may consult with Mr. Price a moment—

Mr. Price: The same answer.

The Witness: Well, may I consult you?

The Court: Certainly. Mr. Price: Surely.

(The witness consulted counsel off the record.)

The Witness: Your Honor, I did not give the previous answer in the light of this particular rule.

The Court: I am not sure that I understand that. The Witnesse I am trying to make myself clear.

### By Mr. Castaldi:

Q. I am not contending that you did, sir. A. All right.

Q. I am not contending that you did. I am asking you, however— A. I am glad you said that, Mr. Castaldi.

Q. I am asking you, however, Mr. Cohen—an' by the way, if any question any time is not clear to you, please feel free to so indicate to me. A. I have asked witnesses

[fol. 57] that time and again, Mr. Castaldi.

Q. Mr. Cohen, I ask you now, in the light of my making known to you the particular requirements or provisions of Rule 5 of the Special Rules of the Appellate Division, with which you stated you are familiar, is your answer still the same with respect to the retention of the records pertaining to your individual law practice for the year 1954 to 1958, inclusive?

The Witness: Your Honor, I don't have to consult my counsel on this. I have been a lawyer long enough. With all due respect to Mr. Castaldi, I don't think it is a fair question, because you are tying it up with the rule that I am familiar with, and I am glad to hear you say you don't accuse me of destroying records.

Mr. Castaldi: No, I do not.

The Witness: But I can't answer your question, because you are asking me in the light of that rule what is my answer to the question? It isn't a question of that rule, your Honor.

The Court: I think it is much simpler than you make it. In effect, counsel called your attention to the rule, with which you said you were familiar.

The Witness: Yes.

The Court: Go back to the original question. The question simply is, have you destroyed any records? That is all.

Mr. Castaldi: 1 accept his Honor's suggestion.
 That is all I ask you now.

The Court: Do you still retain-

[fol. 58] Mr. Price: I told you not to answer. You said you wanted to answer, so go ahead and answer.

The Witness: I have to take my counsel's advice. If I answer it, you said it may be deemed a waiver.

Mr. Price: That is why I said make the same answer.

The Witness: Well, then, specifically upon my counsel's advice, the answer is the same.

The Court: All right.

### By Mr. Castaldi:

Q. Mr. Cohen, during the period of the last five years, and gearing my question to the period 1954 to 1958, inclusive, have you failed or omitted to file a statement of retainer in any personal injury case involving a claimant or client for whom you acted as the attorney on a contingent-fee basis?

The Witness: I will have to ask my attorney about this.

The Court: All right.

The Witness: I would like to answer that.

(The witness consulted counsel off the record.)

- A. As far as I know, Mr. Castaldi, any case in which I was retained by a client, or by an attorney, I filed a statement of retainer. And, as a matter of fact, in any case in which I filed statements of retainer I did not wait for the statutory [fol. 59] period, I filed them as soon as I was retained, as a rule.
- Q. I appreciate your positive statement, sir. With respect to the statements of retainer that have been received in evidence earlier, did you ever employ an agent or a so-called runner to secure any of those claimants as your clients whose names are indicated in the statements of retainer?

The Witness: May I see Mr. Price a moment? The Court: Yes.

(The witness consulted counsel off the record.)

The Witness: My answer is the same, on the advice of my counsel.

Q. Mr. Cohen, did you ever pay or reward any member of the Police Department for referring or bringing to your office a claimant for personal injuries?

The Witness: Upon my counsel's advice, my answer is the same.

Q. Within the last five years, and more particularly during the period of 1954 through 1958, did you pay or agree to pay any member of the Police Department for referring or bringing to your office any of the claimants whose names are reflected in the statements of retainer filed for the same period?

[fol. 60] The Witness: Well, your Honor, I haven't seen the statements of retainer, but my answer is the same.

Q. Lest there be any question as to opportunity to look over the statements of retainer, Mr. Cohen, I want to give you full opportunity to examine anything that you wish that is referred to here and made part of this record. In other words, I do not want, frankly, a qualified answer, and if you want that opportunity, I shall cooperate.

The Witness: No, my answer is the same as indicated, upon my attorney's advice.

Q. For the same period during 1954 through 1958, did you ever pay or reward any court or prison employee for referring or bringing to your office a personal injury case?

Mr. Price: The same answer.

The Witness: The same answer, upon my attorney's advice.

Mr. Price: Just say, "Same answer," will you, please!

The Witness: All right.

Q. I shall ask you the same questions with respect to doctors. I take it that the question now is pretty clear in your mind?

· The Witness: Same answer.

Q. How about employees of any insurance or casualty companies during that same period, did you ever pay or [fol. 6P] agree to pay any such employees for referring or bringing cases to your office involving claims for personal injuries?

Mr. Price: Same answer. The Witness: Same answer.

Q. A broad question then, sir, to encompass all categories: During that same period did you ever agree to pay, and did you pay, any layman for referring or bringing personal injury cases to your office?

The Witness: Same answer.

Q. Did you ever make any cash advances to any lay person as an inducement to refer personal injury cases to your office with a promise that upon any settlement or recovery of any such personal injury case, that lay person would be paid by you an amount equal to 10 per cent of the recovery or settlement?

Mr. Price: Same answer. The Witness: Same answer.

Q. Mr. Cehen, do you know an Al Frangello?

The Witness: Same answer.

Q. Were any personal injury cases ever referred to you or to your office by an Al Frangello?

The Witness: Same answer, your Honor.

Q. Did you ever make any payments or agree to pay or reward a person named Al Frangello, a layman, for re[fol. 62] ferring personal injury cases to you, sir?

The Witness: Same answer, your Honor.

Q. Did an Al Frangollo ever visit you at your office during the last five years?

The Witness: Same answer.

Q. Do you know one Tom Connolly?

The Witness: Same answer, your Honor.

Q. More specifically. Did a Tom Connolly ever refer any personal injury cases to your office?

The Witness: Same answer, your Honor.

Q. Did you ever make any payments or agree to pay, directly or indirectly, one Tom Connolly as a reward for referring personal injury cases to you, sir?

The Witness: Same answer, your Honor.

Q. I am going to ask you the precise questions with relation to some individuals whose names I shall give to you, and I want to know whether in each instance, Mr. Cohen, your answers will be the same, almost in hace verba, with respect to the questions that I put to you with respect to Al Frangello and Tom Connolly. Are the questions that I asked you with relation to Frangello and Connolly fresh in your mind? A. Yes.

Q. All right. So, deeming then that I have asked you those questions with relation to one Joe Marcus, I would [fol. 63] like to know what your answers would be to those

questions if put to you?

The Witness: The same.

Q. With respect to one Albert Gaetani A. Would you spell that, please?

Q. G-a-e-t-a-n-i, or "e" at the end, I am not certain of

the spelling.

Mr. Price: It might even be an "o."

Mr. Castaldi: Could be.

The Witness: Same answer.

Q. And one Abe Kaplan?

The Witness: Same answer.

Q. And one Clifford Bass?

The Witness: Same answer.

Q. And lastly, Antonio Pecorino! A. I didn't get that.

### Q. Antonio Pecorino.

The Witness: Same answer.

Q. I don't know whether this designation rings any kind of responsive chord to you, the only appellation I have for the individual is one Smithy, S-m-i-t-h-y, or Smitty, S-m-i-t-t-y.

The Witness: Same answer.

Q. Do you know the place of employment of Clifford Bass whom I referred to a moment ago?

[fol. 64] The Witness: Same answer.

Q. Would this refresh your recollection, and what would your answer be as to whether he was employed in one of our City hospitals?

The Witness: Same answer.

Q. Have you had any conversations, either in your office or out of your office, with this Clifford Bass, regarding personal injury cases, not involving Clifford Bass?

The Witness: Same answer.

Q. Did you ever have occasion to draw your individual check from your law office account, but in your individual name, to represent, or the proceeds of which went to any of the individuals whose names I have just mentioned as part of a reward or payment for referring a personal injury case to your office?

The Witness: Same answer, your Honor. .

Q. Would your answer be the same with respect to any checks that may have been drawn on the firm account or partnership account, if one there be, of Cohen & Rothenberg, involving any of these individuals?

The Witness: Same answer.

Q. More specifically, were any checks, either your individual account or the firm account of Cohen & Rothenberg, marked "Disb" as the abbreviation for disbursement, the [fdl. 65] proceeds of such checks having been received by

these individuals and charged as a disbursement against the particular cases referred by these individuals?

The Witness: Same answer.

Q. Mr. Cohen, did you ever engage the services of socalled claims adjusters, non-lawyers, to settle any of your personal injury cases with insurance companies and casualty companies?

The Witness: Same answer.

Q. More particuarly with respect to the very claims or cases identified by the names of the clients reflected in the statements of retainer received in evidence here today, did you ever engage the services of an adjuster or a so-called ten percenter to settle any of those particular cases with insurance companies or casualty companies?

The Witness: The same answer, your Honor.

Q. Did you ever make any payments to any so-called adjusters or ten percenters for effecting any settlement or disposition of a personal injury case!

The Witness: Same answer.

Q. My first question was with respect to your engaging their services. I just want to point out that this immediate question is with respect to the particular act of your making payment to any such adjusters.

The Witness: Same answer.

[fol. 66] Q. Mr. Cohen, I preface this question again by saying that if you wish to refer to the statements of retainer that were received in evidence today, I would be glad to give you the opportunity to do so. I want to ask you with relation to those statements of retainer, have you in each instance truthfully set forth the names of identity of the so-called referrers of the particular cases indicated in the statements of retainer?

The Witness: Same answer.

Q. Mr. Cohen, after I have showed this photostat of statement of retainer to Mr. Price, I want to ask you cer-

tain questions. I am referring to a statement of retainer No. 41, which is part of Exhibit 1192, being the statements of retainer filed during the calendar year 1955 by you or on your behalf. (Handed the witness.) Would you just take a moment, please, to read that photostat. (Witness ex-

amines document.) A. Yes, I have looked at it.

Q. You observed, I take it, Mr. Cohen, that the date of agreement as to the retainer in this particular statement is September 14, 1955, and the client's name is Patrick Mc-Cormack, and item 10, as to the referrer, "The client was recommended by Louis I. Rothenberg, who is personally known to the plaintiff." Mindful of the date, September 14, 1955, as being the date of agreement as to the retainer, would you state, please, if Mr. Rothenberg was at that time associated with you in the practice of law?

The Witness: Same answer.

[fol. 67] Q. Where was Mr. Rothenberg on September 14, 1955?

The Witness: May I just see Mr. Price a moment? The Court: Of course.

(The witness consulted counsel off the record.)

The Witness: Same answer.

Q. Was Mr. Rothenberg not confined to a prison or penitentiary on September 14, 1955?

The Witness: Same answer.

Q. Mr. Cohen, it is a matter of public record, and hence I feel free that I may so state, that Mr. Rothenberg was indicted on July 28, 1954, and I do not impute to you, sir, any guilt by association, my question will become apparent in a moment; On July 28, 1954, there was indicted by the New York County Grand Jury, under indictment No. 2553, for conspiracy and solicitation in violation of Sections 270-A, I believe, and 270-D of the Penal Law, and after a plea of guilty to I believe one count, Mr. Rothenberg was sentenced on June 20, 1955. During 1954 was Mr. Rothenberg associated with you in the practice of law?

The Witness: The same answer.

Q. Did you, sir, know of Mr. Rothenberg's activities in the practice of the law that formed the basis for the indictment that I have just referred to?

[fol. 68] The Witness: The same answer.

Mr. Price: You see, your Honor, if I were here as a lawyer—I know I am here out of courtesy—I would object, because the question is highly improper, so the only way to protect the record, in my judgment, is advise my client to do just what he did.

The Court: All right.

Mr. Castaldi: I try scrupulously to avoid any irrelevant questions, and I have no hesitancy in stating, inasmuch as Mr. Price has just made his observation about irrelevancy, that in asking these questions concerning Mr. Rothenberg, and the particular period of time, sir—you will recall I also asked you whether he was associated with you in the practice of law during 1954—that Canon 29 of the Canons of Ethics provides, in substance, that lawyers should expose without fear or favor, before the proper tribunals, corrupt or dishonest conduct in the profession. They should strive at all times to uphold the honor, to maintain the dignity of the profession, and to improve not only the law but the administration of justice.

That is my comment at this time, but I want to point it out as the reason for my asking these questions about Mr. Rothenberg.

Mr. Price: I still don't see the relevancy of it.

# By Mr. Castaldi:

Q. Do you recall with respect to this particular occasion involving the client, Patrick McCormack, as to the disposition of that claim or case?

[fol. 69] Mr. Price: The same. The Witness: Same answer. Q. Do you recall any payments to Mr. McCormack in connection with the disposition of this case?

Mr. Price: The same.

The Witness: Same answer.

Q. Did Mr. McCormack ever visit you at your office?

Mr. Price: Same answer.
The Witness: Same answer.

Q. Do you know if Louis I. Rothenberg, named as the referrer here with relation to this particular claim, made any advances, either prior to or during the pendency of the claim to Patrick McCormack?

The Witness: Same answer.

Q. Do you recall if the time arose when you made any payments to Patrick McCormack and he advised you to deduct from his share of the recovery an advance of \$100 made to him by Louis I. Rothenberg?

The Witness: The same answer.

# By Mr. Castaldi:

Q. Did you refer any of your clients, and more particularly those clients identified in the statements of retainers received in evidence today, to any particular doc-[fol. 70] to or doctors for examination and treatment in connection with their personal injuries?

The Witness: Same answer.

Q. Did you ever pay any doctors' bills for your clients?

The Witness: Same answer.

Q. Mr. Cohen, in compliance with Rule 4 of the Special Rules of the Appellate Division, did you maintain a special bank account separate from your own personal account for the deposit of any moneys resulting from the settlement or disposition of any personal injury cases?

Mr. Price: You might answer that. Pursuant to. Rule 4 did you keep a separate bank account? A. I kept one account which I called a special account. I recall the original rule was enacted and it required the separate deposits of receipts from insurance companies, that I took it up with the clerk in the Appellate Division and I said, "Under this rule I would have to open up a separate account for each case," and he said, "If you have your account, mark it special, and your clients gets your money. Don't worry about it."

So I called it a special account and all my clients got every dollar they were entitled to. I will tell you that, your

Honor.

Q. If I understand the purport of your last answer, you did maintain a separate account? A. I have one account, [fol. 71] Mr. Castaldi, it is called "Albert Martin Cohen, Special." That was one account. As I told his Honor, I

used that as my complete account.

Q. For your law practice, sir? A. Yes. But I also used it to draw my own personal checks as well, and I had done this after speaking with the clerk of the Appellate Division because, as I said to you, when I read the rule it would seem that I would have to open up a special account each time, and if a check came in and I disbursed, there would be nothing left to the account and I would be charged for it. So rather than do that, I maintained this one account for those purposes.

Q. Where did you maintain the account?

Mr. Price: You may answer.

A. Chemical Bank.

Q. What branch, sir! A. Court Street.

Q. How long have you maintained the account at Court Street? A. For many years. I couldn't tell you exactly,

but for many years.

Q. Similarly, with respect to any personal injury cases handled in the firm name of Cohen & Rothenberg, was there a particular account maintained for that purpose or covering the law practice of Cohen & Rothenberg?

The Witness: I will refuse to answer this question upon-the grounds previously stated.

Q. You understand, of course, that my question with relation to the bank account of Cohen & Rothenberg is in-

[fol. 72] tended to be precisely the same as the question that I asked of you which you answered with respect to your individual account for your individual law practice. A. Yes, I understand that.

Q. Do you know an attorney, Ralph S. Fitzer who, I be-

lieve, is at 26 Court Street!

The Witness: I decline to answer.

Q. Mr. Cohen, in 1955, based upon the statements of retainer marked in evidence today, the name of Ralph S. Fitzer, 26 Court Street, is given as the name of the attorney for ten clients whose names are in the statements of retainer during 1955, and your name, sir, is indicated as being the trial attorney in ten of these personal injury cases during 1955 wherein Ralph S. Fitzer was the attorney. Did Mr. Fitzer perform any legal services in any of these ten cases?

Mr. Price: If you want to answer it, answer it.

The Court: Do you want to confer with counsel on it?

The Witness: Yes. The Court: Surely.

(Witness confers with his counsel.)

. (The question was read.)

The Witness: Would you show me the names of those ten cases, Mr. Castaldi?

Q. Certainly. I can identify each one of them. A. I can say this, Mr. Castaldi, even without looking at the [fol. 73] names. In some of those cases he did perform some service and in some he didn't. In other words, he retained me. They were his clients. He may have in some cases issued a summons without a complaint and brough, the case in to me or he may have issued a summons and complaint, or he may have just come in to retain me before instituting the action.

Q. Similarly, in 1956, there were nine such cases from Mr. Fitzer. Would your answer be the same with relation to those nine cases in 1956? A. Yes.

Mr. Castaldi: Your Honor, may I have a moment or two recess?

The Court: Yes.

Mr. Castaldi: Then I should conclude in about ten minutes.

The Court: You and I discussed the question whether the witness should not be advised along certain lines.

Mr. Castaldi: That is precisely what I want to get

my papers together on.

The Court: Suppose we recess for a few minutes.

(A brief recess was taken.)

## By Mr. Castaldi: .

Q. Mr. Cohen, as is your right, and on the advice of your able counsel, Mr. Price, you have invoked your constitu-

tional privileges.

I draw no inferences from your invoking your constitutional privileges. I would feel remiss, however, if I didn't point out what I regard as possible serious consequences [fol. 74] that may flow from your refusal to answer, albeit you invoked your constitutional privileges.

With the indulgence of Mr. Price, and so as to make my position, at least, completely clear, I think in fairness I should point out, and as Mr. Price undoubtedly knows, Subdivision'2 of Section 90 of the Judiciary Law vests the Appellate Division with power and control over attorneys practicing law in this Department and the Appellate Division is authorized to mete out appropriate disciplinary punishment for anyone proved guilty of professional misconduct or any conduct prejudicial to the administration of justice.

I am mindful too, Mr. Cohen, that a person licensed to practice law does not, in my view at least, have an absolute right to practice but rather, as the Courts have said in some of the cases, that the practice of law and membership in the legal profession is burdened with some conditions, and some of those conditions are spelled out for us in the Canons of Ethics, and I assume you are generally familiar with the Canons.

Bearing on my immediate discussion, I want to specifically direct your attention to some of the Canons only because

they encompass matters that are within or contemplated

by the very questions that I put to you today.

By way of illustration, Canon 22 of the Canons of Ethics provides in substance that the conduct of the lawyer before the Court and with other lawyers, should be characterized by candor and frankness.

Canon 28 is of particular relevancy to many of the questions that I put to you today in that it provides that it is disreputable to employ agents or runners to seek out per-[fol. 75] sonal injury claims or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to a lawyer's office or to remunerate policemen, court or prison officials, physicians, hospital attaches, or others who may influence the bringing of personal injury cases to a lawyer.

Canon 28 goes on to provide that a duty to the public and to the profession devolves upon every member of the bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

And in a somewhat like vein as to what I have just said is provided in Canon 29 which I read to you in substance, at least, during my questioning, with respect to the Mc-Cormack claim and Louis I. Rothenberg.

Canon #34, regarding division of fees, except with a

lawyer, is improper.

To supplement the Canons, a more proper term is in harmony with the Canons of Ethics or vice versa, we have several provisions of the penal law of this State. Section 270-A of the Penal Law prohibits any person from soliciting legal business or soliciting a retainer authorizing an attorney to render legal services.

Section 270-C of the Penal Law prohibits any person employed or attached to a hospital, sanitarium, police department, prison or court, to communicate with an attorney or someone on his behalf for the purpose of aiding the attorney in the solicitation of legal business or in the solicitation of a retainer authorizing the attorney to render legal services.

Section 270-D of the Penal Law prohibits an attorney from employing a person to solicit legal business for the [fol. 76] attorney or to solicit a retainer authorizing the

attorney to render legal services.

Lastly, in Section 276 of the Penal Law we have a provision prohibiting so-called fee splitting with any lay person and prohibiting the sharing of any attorney's fees or compensation.

In brief, those are some of the applicable provisions, statute and Canon law that I think might well apply in your particular situation, and I do not presume at all to say that you are, nor do I pass judgment upon your guilt or innocence of any of the acts or actions embraced within the Canons or the Statutes or indeed referred to in the questions that I put to you today, but I do believe that as a member of the legal profession you owe it to the Appellate Division and to this Additional Special Term designated by the Appellate Division, to answer the questions that were put to you today for the purpose of enabling the Additional Special Term to submit the facts, with appropriate recommendation, to the Appellate Division.

The law that may also apply in the situation will not come from me. That you can be, I am confident, adequately advised by your counsel, Mr. Price. It is not my province to make any particular recommendation to his Honor, Judge Baker. That is solely for him to do in the light of the entire record, and for him to make, and exclusively his, to make such recommendation to the Appellate Division, as

he may deem appropriate.

My sole purpose, and I emphasize it, as the sole purpose, to take these few minutes, was to point out to you very clearly, and if you have any questions I want you to feel [fol. 77] free to ask me or certainly his Honor, Judge Baker, any questions that might clarify, if there is any clarification needed in your mind, as to the relevancy and the consequences that might flow from your refusal to answer these questions today.

Mr. Price: I don't think my client should answer that.

Mr. Castaldi: I didn't expect an answer except that I wanted him to feel perfectly free to ask any question for clarification or otherwise. Mr. Price: Superficially, at least, we have gone into this situation and in absolute candor and in fairness to your Honor I might state to your Honor that we understand our position, and that is probably the question that will have to be litigated in the situation, and what we have done we haven't done anything with the idea of hindering the investigation or being discourteous to your Honor.

On the contrary, we don't feel that way about it. We have taken the position because I think that the law is well settled and we have authority for our

position.

So that there can be no misunderstanding, Mr. Cohen feels very, very kindly to you, the gentleman who is presiding here, to the Court, to the Appellate Division and even to the Judicial Inquiry, but our position is clear and weathink we are right in doing just what we have done.

The Court: I think there is no question but that Mr. Castaldi's view has been clearly stated.

[fol. 78] Mr. Price: I am inclined to agree with you, sir.

The Court: It is his feeling that the witness availing himself of his constitutional privilege with respect to questions which are material and relevant, those which have to do with his practice of the law, that his availing himself of his constitutional privilege may in and of itself be a sufficient basis for a recommendation to the Appellate Division:

Isn't that your position?

Mr. Castaldi: I did not intend to make it so restrictive in that I am mindful that an attorney, like any other citizen, has a right to avail himself of his constitutional privilege. But I do say that under the circumstances of this matter wherein questions asked relate to his fitness and his conduct and it is part of an inquiry designed to help your Honor carry out the mission entrusted to you by the Appellate Division, that he is under a duty to answer, his constitutional privileges notwithstanding, and his fail-

ure to answer, in my view, may well give rise to

disciplinary action.

Mr. Price: We don't agree on that. We rely specifically in the matter of Gray and in the matter of Ellis, in 258 Appellate Division, which was reversed by the Court of Appeals, and the Court of Appeals adopted, in my judgment, the language of Judge Lazanski who dissented and held that the attorneys who invoked their constitutional privileges were doing what they had an absolute legal right to do, and [fol. 79] if they had a legal right to do it, they had a moral right to do it, and therefore if they do it, no consequence can come to them for asserting that which the law gives them, in addition to giving it to an ordinary citizen who is not a lawyer.

The Court: I have in mind that the investigatory body in those cases had the right to grant immunity

under the statute.

Mr. Price: No, Judge.

The Court: And that the persons under investigation offer to make full disclosure but refused to waive their constitutional privileges. Isn't that the situation in those two cases?

Mr. Price: Your Honor, they were called upon

to sign waivers of immunity.

The Court: Which they refused to do. Mr. Price: Which they refused to do.

The Court: But they offered to make full disclosure.

Mr. Price: May I say this to you, sir, if in that case they came back later, after having refused to testify and after having refused to sign waivers, they came back and they wrote letters to the Judge and to Mr. Kennedy, who was formerly—well, he followed me as a clerk for Judge Steinbrink, that they were willing to testify but not sign waivers of immunity. But while that does appear in the record, that was not the turning point in the case. The Court of Appeals, as I view-it, and if I am wrong the Court of Appeals will have to tell me so, and I don't think that I am wrong, Judge Lazanski [fol. 80] clearly and very specifically says that the

invocation or the calling upon your constitutional rights can in no instance be the basis for disciplinary proceedings, and I stand on that statement. That is my position.

Mr. Castaldi: The issue, your Honor, appears to

be at least clearly drawn.

Mr. Price: I think so.

Mr. Castaldi: I think Mr. Price has made a very frank statement of his views of the law. I, of course, do not accept those views, I think the philosophy expressed in subsequent and more recent decisions represents the state of the law, which I don't expect Mr. Price to adopt. But overshadowing and perhaps permeating this entire discussion, it seems to me is the requisite on a member of the bar to be at all times candid and display the attitude of candor and frankness and fairness with the Court to aid the supervisory body, the Appellate Division, to determine if the particular lawyer has or has not committed any professional misconduct.

Mr. Price: That will be the ultimate question for the Courts to decide. But I say no Court and no Canon of Ethics can overrule a constitutional provision. The Constitution and its articles of amendment are supreme, and if we have it, we have a right to resort to it. My contention is clear that if we do, we can't be disciplined for doing that which the law says we have a perfect legal and moral right to do.

That is my position.

[fol. 81] Mr. Castaldi: That is the issue.

Mr. Price: All right, sir. I want to say that I am very, very grateful to your Honor for your patience and your kindness and your courtesy, and I am sure my client is. And I am very thankful to you for your kindness and patience, Mr. Castaldi, and you, Mr. Caputo. I think we have all tried to act as lawyers.

The Court: I think, however, before we wind up I should ask the witness this question. In view of the statement which was made by Mr. Castaldi, if the identical questions which have been asked were

again propounded to you, would your answers be the same?

Mr. Price: Yes. The Witness: Yes.

Mr. Price: Because he is following my advice and my advice would be to have him say that.

The Court: 'All right.

Mr. Price: I thank you very kindly. My client propounded a question to me, your Honor, that if the Courts ultimately say that he should have answered the questions, will he have that opportunity of coming back later and answering them, if they say he was wrong in following my advice.

The Court: I am not prepared to answer that at this time.

Mr. Castald: I would not want to mislead Mr. Cohen. I do believe, however, that it is an incident of a proceeding of this kind, it is a risk that must be weighed and calculated carefully by Mr. Cohen [fol. 82] now and not say, "Well, I will stand by and perhaps I will have another bite of the cherry."

Mr. Price: I know if your Honor had assumed summary jurisdiction and undertook to punish him for contempt for his failure to answer questions after you directed him to, it has always been the method used by the Court in saying, "I will give you a chance to purge yourself,"-

Mr. Castaldi: I would say this-

Mr. Price: If it took that, I have seen that many, many times where witnesses were committed because they declined to do as directed by the Court and then the Court says, "Well, I will give you a chance to purge yourself."

Mr. Castaldi: Your Honor, if I may suggest this, I do believe that we are needlessly inviting difficulty if we seek to project this into the future. We know

not what may happen—

Mr. Price: I am inclined to agree with you.

Mr. Castaldi: On your particular request or in question form, as you put it, as to whether Mr. Cohen. if this legal issue be decided adversely to him, we would have the opportunity to come in to answer the questions, I for one would want to make it perfectly clear that I make no representation nor would I want to be a party to any commitment of any kind at this time.

Mr. Price: I think, your Honor, that that question eventually would have to be answered either by the Appellate Division or the Court of Appeals.

[fol. 83] The Court: I think so.

Mr. Price: After thinking it over, Mr. Cohen just asked me to propound it to your Honor, and I did, but I don't think that it is is up to you or to me, but it will be up to whichever Court acts upon it.

The Court: I think you are right.

Mr. Price: Thank you, sir.

(Witness excused.)

[fol. 84]

In Supreme Court of the State of New York
Appellate Division—Second Judicial Department

### ANSWER TO PETITION

Answering the petition herein, the respondent respectfully alleges:

First: Admits the allegation contained in Paragraphs "1 to 22" inclusive of the petition.

Second: Denies each and every allegation contained in Paragraph "23" of the petition.

### RESPONDENT ALLEGES AFFIRMATIVELY:

That ir declining, upon the advice of his counsel, to answer the questions before the Judicial Inquiry and to produce documents pursuant to the subpoenas duces tecum, respondent was motivated solely by a desire to preserve his constitutional right against self-incrimination; that in so doing, respondent was and now is of the bona fide belief that he was within his legal and constitutional rights and moral prerogative in pleading the privilege against self-incrimination guaranteed to all persons, lawyers or laymen

alike, under Article 1 Section 6 of the New York State Constitution; that respondent honestly and sincerely relied upon his understanding and the understanding of his coun[fol. 85] sel of the decisions of the Court of Appeals (in the cases of Matter of Kaffenburgh, 188 N. Y. 49; Matter of Ellis, 282 N. Y. 435, and Matter of Grae, 282 N. Y. 428); that the imposition of any discipline upon respondent for asserting said privilege against self-incrimination would be a denial to him of due process in violation of his rights under the Constitution of the State of New York and under the 34th Amendment of the Constitution of the United States and would impose upon him an unjust and undue penalty, hardship and forfeiture.

The right to practice law is a right of liberty and property protected by the Fourteenth Amendment to the Con-

stitution of the United States.

Wherefore, respondent respectfully prays that the petition herein be dismissed and for such other and further relief as may be just and equitable in the premises.

(Verified by Albert Martin Cohen on July 31, 1959.)

[fol. 86]

### IN SUPREME COURT

Appellate Division—Second Judicial Department Nolan, P.J., Wenzel, Beldock, Ughetta and Kleinfeld, JJ.

#### OPINIONS OF THE COURT

Disciplinary proceedings instituted by Denis M. Hurley pursuant to an order of this court entered June 22, 1959. Respondent was admitted to the Bar December 6, 1922 at a term of the Appellate Division of the Supreme-Court in the Second Judicial Department.

Denis M. Hurfey for petitioner.

David F. Price for respondent.

## Beldock, J.

More than 40 years ago the eminent jurist Chief Judge Cardozo, declared: "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy [fol. 87], lawyer from the roll is no los add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment" (Matter of Rouss, 221 N. Y. 81, 84-85).

On the ground that respondent, a member of the Bar since 1926, by his conduct has broken the condition; this proceeding is brought to declare that he has lost the privi-

lege of membership in the Bar.

The genesis of this proceeding is a judicial inquiry. undertaken by direction of this court? Advised by the Brooklyn Bar Association's petition (presented after its own investigation) of serious abuses and ungthical practices by attorneys in Kings County with respect to their procurement of negligence cases on a contingent basis and with, respect to their prosecution of such cases, this court in the exercise of its inherent and statutory power and duty (N. Y. Const., Art. VI, §2; Judiciary Law, §90; People ex rel. Karlin v. Culkin, 248 N. Y. 465), ordered a judicial inquiry. The inquiry was ordered with respect to the al-·leged illegal, corrupt and unethical practices and with respect to the alleged conduct prejudicial to the administration of justice by artorneys and others acting in concert with them, in Kings County. The purpose of the inquiry is to expose all the evil practices, with a view to enabling this court-to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them.

The existing conditions in Kings County as a result of the abuses in the handling of negligence cases by attorneys, [fol. 88] is well portrayed by Chief Judge Cardozo in his summary of the causes leading to the 1928 "ambulance chasing" investigation (People exercl. Kurlin v. Culkin,

supra, p. 468). Unfortunately, the evils of yesterday have

returned to plague us today.

In fairness and in justice to the legal profession, however, we state at the outset that the number of lawyers who appear to be involved in the alleged unethical practices is minute in relation to the total number of honorable practitioners at the Bar in Kings County.

During the period 1954 to 1958 inclusive, pursuant to the rules of this court, the respondent, who apparently specialized in negligence cases, filed 228 statements as to retainer in his own name and 76 such statements in a firm name, thus indicating that he and his firm had been retained on a contingent basis in a total of 304 negligence cases. He was duly subpoenaed to testify and to produce his records with respect to such cases before the Justice designated by this court to conduct this judicial inquiry at an additional Special Term. On the advice of counsel, respondent invoked his constitutional privilege against self incrimination and refused on that ground to answer pertinent questions and to produce his records.

It is not disputed that respondent has asserted his constitutional privilege in good faith. Nor is it disputed that the questions put and the records sought come within the scope of the inquiry and that the information sought to be elicited would be relevant. Indeed, these facts are vir-

tually conceded by the parties to this proceeding.

The petition now presented to the court seeks to discipline respondent, not on the ground that he has asserted his [fol. 89] constitutional privilege, but on the ground that his refusal to answer relevant questions and his refusal to produce relevant records "are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession", in that such refusals (a) are "contrary to the standards of candor and frankness that are required " of a lawyer to the Court", (b) are "in defiance of and flaunt [flout] the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer", (c) have "hindered and impeded the Judicial Inquiry" which had been ordered by this court, and (d) have resulted in respondent's withholding "vital"

information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession".

Thus, the sole question for our determination is whether the respondent, by reason of his refusal to answer relevant questions and to produce relevant records, may be disciplined as a lawyer, or, stated differently; does his constitutional privilege against self incrimination shield him, not only from possible criminal prosecution, but also from disciplinary action as a member of the Bar for failing in his duties, obligations and responsibilities as a lawyer to the court!

This question goes; to the heart of a serious and farreaching problem confronting the Bar, the courts and the public. When this question is finally resolved it will affect the standing at the Ear, not only of this respondent, but of many other lawyers who similarly have asserted their constitutional privilege against self incrimination as a basis [fol. 90] for refusing to divulge pertinent information with respect to their practices in relation to negligence cases. The resolution of this question will also determine in large measure whether this court's supervisory and regulatory power over lawyers, and whether this court's plenary power to curb all evil and unethical practices in the professionof the law, are to be suppressed and subverted, and whether this court is to be rendered impotent in the performance of its inherent and statutory duties relating to attorneys. and to the administration of justice.

In order to keep in proper perspective the precise question to be decided here, it should be emphasized that with respect to the members of the Bar collectively, this court has the positive affirmative duty, springing both from its ancient plenary jurisdiction over attorneys and from the express statutory delegation of such power, "to keep the house of the law in order"; to compel attorneys "to submit to an inquisition as to professional misconduct", to ascertain the existence of practices which are prejudicial to the administration of justice, to compel the discontinuance of such practices and to discipline those attorneys who may have engaged in them. For the achievement of these-ends this court is empowered to make any rule, to hold

any inquisition, and to require any attorney to attend and to give evidence under oath. The end and the aim of the inquisition are not punishment, but discipline. And every attorney, as an officer of the court, has the reciprocal duty to aid the court, to co-operate with it, to obey its rules and orders, to respond to all relevant questions put by the. court or by the agency conducting the inquiry on its behalf, [fol. 91] and to refrain from doing any act which might thwart the inquiry (Judiciary Law, 90; Gair v. Peck, 6 N. Y. 2d 97, 111; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470-479, supra; Matter of Queens County Bar Assn. v. Dwyer, 254 App. Div. 769; Matter of Cherry, 228 App. Div. 458, 464-465; Matter of Brooklyn Bar Assn., 223 App. Div. 149, 151-153; Matter of Bar Assn. of City of New York, 222 App. Div. 580, 584-587; Matter of Flannery, 150 App. Div. 369, 371, affd. 212 N. Y. 610).

And with respect to any particular member of the Bar, whenever the occasion demands or whenever his character and fitness are called into question, this court likewise has the positive affirmative duty to re-examine into them and to ascertain whether he still possesses the requisite character and fitness to continue to be a member of the Bar. If it finds that he does not, it must disbar him—not by way of punishment, but "for the protection of both the court and the public \* \* \* from the official ministration of persons unfit to practice." An attorney may continue in the practice of the law only so long as he continues in the possession of the requisite character and fitness (Judiciary Law, \$90; In re Thatcher, 190 Fed, 969, 975-977; Matter of Donegan, 265 App. Div. 774, 787-788; Matter of Rouss, 221 N. Y. 81, 84-85, supra; In re Durant, 80 Conn. 140, 147).

We disagree with respondent in his contention that the purpose of this proceeding is to discipline him "because he has invoked his constitutional privilege against self-incrimination." Respondent urges, in effect, that his rights as a citizen to be free from punishment for invoking his constitutional privilege are being destroyed if, in his capacity as a lawyer, he may be disciplined for resorting to [fol. 92] such privilege as a citizen. But his argument overlooks the undeniable fact that respondent, with respect to his rights as a citizen and with respect to his obligations as a lawyer, stands in a dual position.

We agree that respondent's rights as a citizen may not be withheld or impaired in a disciplinary proceeding. No person, layman or lawyer, may be compelled to give testimony against himself if, in good faith, he claims that such testimony may tend to incriminate him. Nor may any person, layman or lawyer, be compelled to sign a waiver of immunity from future criminal prosecution. And no inference of guilt or misconduct may be drawn from the exercise of such a constitutional privilege. In any inquiry, investigation, trial or proceeding the respondent has every right to assert his constitutional privilege in response to any question, whether it deals with his professional acts as a lawyer or otherwise. And he cannot be disbarred for his assertion in good faith of his constitutional privilege. These principles have been well established by our highest courts and we abide by them.

However, we are not dealing here with an attempt to force respondent to testify/despite his assertion of his constitutional privilege against self incrimination or his refusal to sign a waiver of immunity. This is not a typical "Fifth Amendment" case. No action is sought to be taken against respondent because of his beliefs, his affiliations with subversive groups, or any specific act of doubtful propriety. The judicial inquiry here deals generally and essentially with the procurement and the prosecution of negligence cases, and the questions put to respondent re[fol. 93] late only to his practices with respect to the 304 statements as to retainer filed by him and his firm and with respect to the negligence cases which they embrace.

Hence, there is involved here only the question of whether respondent in his capacity as a lawyer may be absolved from all his duties, responsibilities and obligations to the Bar and to the court to help expose and uproot evil practices and corruption at the Bar and in the courts with respect to negligence cases. If, as it has been often held, disbarment is not criminal punishment, then by asserting his constitutional privilege against self incrimination and thus gaining immunity from criminal prosecution or punishment, is the respondent free to flout and destroy the basic relationship between the lawyer and the court? Can he, with impunity, disregard the canons of ethics and cast

to the winds all inquiries into his professional conduct as a lawyer? Can be disregard his obligation to be frank and candid with the court? Can be negate his duty to cooperate with this court to expose the evil and unethical practices at the Bar and in the courts? Can be refuse to assist this court in its quest-to maintain the integrity and morality of the members of the Bar and to maintain the high standards of the legal profession? We say, emphatically no.

This court already has expressed its opinion upon the basic question here posed, namely, whether the attorney's right as a citizen to assert his constitutional privilege against self incrimination, suspends his duty as an attorney and officer of the court to aid the court in its judicial in-

quiry into unethical practices.

In 1940, in Matter of Ellis (258 App. Div. 558, 565-566) and in Matter of Grae (258 App. Div. 576), a majority of this court, after reviewing the authorities. anhounced this court's view and future policy with respect to attorneys who assert their constitutional privileges as a ground for refusing to divulge pertinent information upon a judicial inquiry. Such view and policy were stated as follows (p. 566): "If an attorney is summoned to assist the court by his testimony at its investigation, instituted to uncover unlawful and unethical practices impairing the due administration of justice, and he refuses to answer. the court's questions on the ground that his answers would tend to incriminate or degrade him, or unless he is granted immunity, he is guilty of professional misconduct or conduct prejudicial to the administration of justice and will be disbarred."

In adherence to such policy this court suspended Ellis and Grae from the practice of law. But it did so on two separate and distinct grounds, namely: (1) that their assertion of their constitutional privilege against self incrimination does not excuse their refusal to testify and to divulge per ment information; and (2) that their insistence upon retaining their constitutional privilege of immunity from prosecution and declining to sign a written waiver of such immunity, impeded the investigation and constituted conduct prejudicial to the administration of justice.

Thereafter, in both the Ellis and Grae cases, the Court of Appeals reversed the orders of this court (Matter of Grae, 282 N. Y. 428; Matter of Ellis, 282 N. Y. 435). Such reversal, however, was based solely on the second ground fol. 95 stated. It was held that the attorneys' refusal to yield their constitutional immunity from criminal prosecution in advance of their testimony and as a condition to permitting them to testify at the judicial inquiry, did not impede the inquiry and is not professional misconduct. This conclusion rested on the express finding of the Court of Appeals that attorneys Grae and Ellis, time and again, had evinced their willingness to co-operate, to testify fully and frankly and to make all their records available if they were not deprived in advance of their constitutional immunity from criminal prosecution by reason of their proffered festimony. The question as to the right of an attorney to refuse to testify in reliance on his constitutional privilege against self incrimination was not reached by the Court of Appeals. Obviously, the consideration of that nuestion became unnecessary because, as stated, both Ellis and Grae were perfectly willing to co-operate with the inquiry and to divulge all relevant information if they had been permitted to retain their constitutional immunity against future criminal prosecution.

Hence, while this court already has taken the unequivocal position that upon a judicial inquiry an attorney, by the assertion of his constitutional privilege against self incrimination cannot avoid his obligation as a member of the Bar and as an officer of the court to divulge all relevant information in his possession, the Court of Appeals has not yet definitively passed upon the precise question.

In the light of the respective duties of court and attorney and in the light of recent decisions, we have now reexamined this court's position as expressed in the *Grac* [fol. 96] and *Ellis* cases (supra), insofar as it relates to the effect of an attorney's assertion of his constitutional privilege against self incrimination. After such re-examination we have no hesitancy in affirming such position, limiting it however to the effect of the plea against self incrimination. When so limited, the position of this court is not inconsistent, with the position taken by the Court

of Appeals in the *Grae* and *Ellis* cases (supra), since, as already stated, in those cases the Court of Appeals held only that a waiver of immunity from future criminal prosecution may not be exacted from an attorney as a condition to permitting him to testify in a judicial inquiry.

The highly responsible, and at the same time delicate, position of the lawyer in our society has been well described by Mr. Justice Frankfurter (Schulare v. Board of Bar Ex-

aminers of New Mexico, 353 U. S. 232, 247):

"Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history. the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those [fol. 97] qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'" Mr. Justice Frankfurter also pointed out (pp. 248-249) that it is this "moral character" which "has been the historic unquestioned prerequisite of fitness? to be a member of the Bar, and that to "a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts".

It is fair to say, in view of the fiduciary responsibility entrusted to the lawyer, that the corruption or deterioration of his moral character, would undermine the administration of justice and thus endanger the security of the State itself. As so aptly said by Chief Justice Charles Evans Hughes, the practice of the profession of the law is "the privileged administration of a public trust affording the necessary means by which private and public rights are vindicated, private and public wrongs are redressed.

and the very basis of civilization is made secure' " (Matter of Williams, 158 F. Supp. 279, 280).

The courts, and the lawyers as integral functionaries and officers of the court, are the foundation upon which the administration of justice must rest. And, it has been oft reported, the true administration of justice is the firmest pillar of good government. It is for these reasons, as indicated by the cited cases, that the courts from time immemorial have exercised plenary and summary jurisdiction over attorneys, have required them collectively and indifol. 98] vidually to conform to the highest standards of rectitude and have swiftly disciplined them for any departure from such standards.

When the position of any person is one of trust and responsibility, one which directly affects the public interest or the security of the State, and one which consequently requires a high degree of moral character and fitness, such person may be removed from his position if he elects to assert his constitutional privilege against self, incrimination as a basis for his refusal to answer relevant questions which seek to determine whether he still possesses such character and fitness. So the courts recently have held as to a teacher, a subway conductor and a policeman (Beilan v. Board of Educ., 357 U. S. 399; Lerner v. Casey, 357 U. S. 468, affg. 2 N. Y. 2d 355, affg. 2 A. D. 2d 1 [2d Dept.]; Matter of Delehanty, 280 App. Div. 542, affd. 304 N. Y. 725; Christal v. Police Comm. of San Francisco, 92 F. 2d 416).

It is true that in the four cases last cited there was a special statute which in effect made compulsory the employee's maintenance of such character and fitness and which permitted his discharge when the administrative agency by which he was employed determined after a hearing that he lacked the requisite character and fitness or that a reasonable doubt exists whether he does. But the principle on which they were all decided is the same, namely: that while the employee is entitled to refuse to answer any relevant question on the ground that his answer might tend to incriminate him, nevertheless, by reason of his refusal to divulge the relevant information sought, the agency was justified in concluding that he lacked the

requisite character and fitness and in removing him from [fol. 99] his position. The rationale is, not that he is being punished for invoking his constitutional privilege, but rather that he is being removed from his position because the agency; by reason of his refusal to furnish the information sought, is entitled to conclude that he no longer possesses the requisite character and fitness to continue in the agency's employ.

Of course, no statute is needed to prescribe the high moral character at all times requisite for the lawyer or to define his obligation to the court or his duty to promote the administration of justice and never to impede it. As indicated by the cited cases, such character, obligation and duty are implicit and fundamental: they have been the prerequisites of the office of an attorney and counselor at law from time immemorial, and without them the true ad-

ministration of justice could not long survive.

But since the high standard of conduct to which the lawyer must conform is incapable of precise definition the Legislature has wisely confided to this court a plenary power and control over all lawyers (Judiciary Law, \$90, subd. 2; Gair v. Peck, 6 N. Y. 2d 97, supra; People ex rel. Karlin v. Gulkin, 248 N. Y. 465, supra; Matter of Brooklyn Bar Assn. of City of New York, 223 App. Div. 149, supra). And, as observed some years ago by the Court of Appeals: "In establishing the standard of conduct to which the bar must at its peril conform, the Appellate Division has a wide discretion, with which we have neither the wish nor the power to interfere" (Matter of Flannery, 212 N. Y. 610, 611, supra).

Respondent relies on several cases (to wit, Matter of Grae, 282 N. Y. 428, supra; Matter of Ellis, 282 N. Y. 435, [fol. 100] supra; Matter of Kaffenburgh, 188 N. Y. 49, 52-53; People ex rel. Karlin v. Culkin, 248 N. Y. 465, supra) as upholding the attorney's right to immunity from disbarment by reason of his assertion of his constitutional privilege against self incrimination. In our opinion, none of them so holds, as well be indicated below. Moreover, as already noted, the real question to be determined here is, not whether the attorney is immune from disbarment by reason of his assertion of his constitutional privilege, but

whether the attorney is immune from disbarment by reason of his refusal to co-operate with the court in a judicial inquiry into unethical practices and by reason of his refusal to come forward with an explanation of his conduct when

the circumstances require it.

In the Grae and Ellis cases (supra), the Court of Appeals, as previously noted, settled and decided only one proposition, namely, that an atterney who is willing to testify in a judicial inquiry but who is unwilling, in advance of his testimony and as a condition to permitting him to festify, to sign a waiver of immunity from future criminal prosecution, is not subject to discipline by this court by reason of his refusal to sign such waiver. Indeed, this holding is consistent with our own prior holding (cf. Matter of Solovei, 250 App. Div. 177, affd. 276 N. Y. 647), as well as with our holding in the instant case.

In the Kaffenburgh case (188 N. Y. 49, 52-53, supra) the Court of Appeals held only that an attorney could not be disbarred because on the trial of his former employer apon an indictment for conspiracy to defraud, the attorney who had appeared as a witness had invoked his constitutional and statutory privilege against self incrimination [fol. 101] and refused to answer relevant questions. That case did not involve the refusal of an attorney to divulge information upon a judicial inquiry, such as the one here.

In the Karlin case (248 N. Y. 465, supra), during the course of a judicial inquiry such as the one here, the attorney appeared in court but refused to be sworn or to testify as to his conduct in the procurement of retainers. The Court of Appeals, in an opinion by Cardozo, Ch. J., held that he had been properly held in contempt for his refusal. The only point it decided was that the attorney could not thus defy the inquiry and thwart its purpose by refusing to testify as to what he knows about the evil practices in the profession. Incidentally, the court also indicated that his testimony would be "subject to his claim of privilege if the answer will expose him to punishment for a crime". But the only inference to be drawn from this remark is that if he did testify in the judicial inquiry he could claim his privilege against self incrimination without fear of being held again in contempt and without fear

of future criminal prosecution. The remark had no relation to the question of whether or not the attorney, if he should assert his constitutional privilege in good faith, could thereafter be disciplined or disbarred as an attorney because of his refusal to divulge relevant information sought in the judicial inquiry. That this is so is made quite plain by the sharp distinction which Chief Judge Cardozo himself drew between a criminal and a disciplinary proceeding. He pointed out that:

"The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the crimes of the crimes. There are, however, many forms of professional misconduct that do not amount to crimes. Even when they do, disbarment is not punishment within the meaning of the criminal law. Inquisition by the court with a view to the discipline of its officers is more than a superfluous duplication of inquisition by the grand jury with a view to punishment of criminals. The two fields of action are diverse and independent". (People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470 [emphasis supplied]).

This conclusion as to the holding in the Karlin case (supra) also finds ample support in the opinion of the Court of Appeals in a subsequent case (Matter of Levy. 255 N.-Y. 223, 225). In the Levy-case, the Appellate Division in the First Department had disbarred an attorney because it found that upon a judicial inquiry, similar to go the one here involved, he had pleaded his constitutional privilege in bad faith. The Court of Appeals dismissed the appeal on the ground that the constitutional privilege is not available when it is urged in bad faith and, hence, no question of constitutional construction is properly before the Court of Appeals. It then, apparently, went out of its way, however, to state (p. 255) that it would "pass as unnecessary for consideration at this time the question whether the assertion in good faith [upon a preliminary judicial inquiry of the privilege against self-incrimination is ground for disbarment."

It will be noted that the Levy case was decided two years after the Karlin case, that the same judicial inquiry was involved in both cases, that the opinion in the Levy case [fol. 103] cites the Karlin case, and that, notwithstanding

the Karlin case, the Court of Appeals in the Levy case clearly indicated that the issue here involved is still an open one and would be decided by the Court of Appeals only when it became necessary to do so and when it is properly presented.

It is also significant that the statutes granting a witness immunity from prosecution or from any penalty or forfeiture when he is compelled to answer despite the assertion of his constitutional privilege against self incrimination, are not deemed to include disbarment. Such immunity statutes do not include disbarment because they are ordinarily "designed to give an immunity as broad as the constitutional privilege, and no broader", because the Constitutional privilege, and no broader", because the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself, and because a proceeding looking to disbarment is not a criminal case or a penalty or forfeiture (Matter of Rouss, 221 N. Y. 81, 86, supra; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470, 475, supra; Matter of Solovei, 250 App. Div. 117, 121, affd. 276 N. Y. 647, supra).

In view of (a) the high standard of character and morality required of the attorney as a condition both to his admission and to his retention in the fallowship of the Bar, (b) the close fiduciary relationship between him and the court, (c) his solemn duty to uphold the integrity of the courts and the Bar and to promote the administration of justice, (d) this court's plenary power and control over him in his capacity as an attorney and counselor at law, (e) the fact that; for good cause shown, this court has initiated a judicial inquiry into unethical practices of attor-[fol. 104] neys in relation primarily to negligence cases. and (f) the fact that in the course of such inquiry it apseared that the respondent and his firm filed a large numher of statements as to retainer (an average of more than 60 a year during the five-year period from 1954 to 1958) for such negligence cases, we say that upon interrogation by the court or its agency there is cast upon him as an officer of the court the affirmative duty to come forward with a full and adequate explanation of every such retainer and to thus re-establish his high moral character.

This conclusion also necessarily flows from the fact that to the extent of respondent's examination before this ju-

dicial inquiry, such inquiry inevitably became a preliminary inquiry pro tanto into his personal practices for the purpose of determining whether he had engaged in unethical conduct and for the purpose of determining whether he still possessed the high moral character requisite for a member of the Bar.

· We repeat: every attorney has an absolute right to assert his constitutional privilege against self incrimination as the basis for his refusal to give any explanation of his conduct or his activities, and when he does so he cannot be compelled to testify. But the moment he asserts be constitutional privilege he creates his own dilemma. Thereupon, after opportunity for reflection (which was here given to the respondent), it is for the attorney to choose whether he will rest upon his constitutional privilege or whether he will discharge his duty to cooperate with the court in its judicial inquiry into unethical practices. If, as here, he deliberately elects not to cooperate with the court, then the court has no alternative but to revoke his priv-[fol. 105] ilege to continue as a member of the Bar. For his duty to the court is inviolable. He cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical practices, and yet be permitted to retain his privilege of membership in an honorable profession.

Such membership, it should be emphasized, is a revocable privilege. "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice" (Vinson, Ch. J., In re Isserman, 345 U. S. 286, 289). We should be ever mindful of the admonition of Mr. Justice Brandeis that "If we desire respect for the law, we must first make the law respectable" (Lief, The Brandeis Guide to the Modern World, p. 166).

To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he

had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar.

As Chief Justice Cardozo pointed out in the Kaflin case (supra, p. 473), the court will make "short shrift" of such a lawyer; it will promptly strike his name from the roll of attorneys and deprive him of his privilege to practice. [fol. 196] And, as indicated, such deprivation or such disbarment is not deemed to be punishment, but discipline which the court was always empowered to administer (People ex rel. Karlin v. Culkin, 248 N. Y. 465, supra; Judiciary Law, \$90, subd. 2).

Respondent should be disbarred and his name should be ordered to be struck from the roll of attorneys, with leave to apply to vacate the order to be entered hereon upon proof that, within 30 days after the entry thereof, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all-relevant records in accordance with the subpoena duces tecum.

Wenzel and Ughetta, JJ., concur with Beldock, J. Nolan, P.J. (concurring).

If this were a matter of first impression, I would favor a determination in accordance with the views expressed in the dissenting opinion of Presiding Justice Lazansky in Matter of Ellis (258 App. Div. 558, 567-575). However, the precise question presented here was decided by this court in that proceeding contrary to the views expressed by the Presiding Justice, and that decision was not affected by the reversal in the Court of Appeals of our determination made at the same time that the failure by the respondent in that proceeding to sign a waiver of immunity constituted professional misconduct. Consequently, I concur in the result.

#### [fol. 107] KLEINFELD, J. (dissenting),

Despite all disclaimers to the contrary, respondent is being disbarred for pleading his privilege against self in-

crimination. The Court of Appeals of this State is committed to the view that this cannot be done and in *Matter of Grae* (282 N. Y. 428, 434-435) stated:

"The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State; and neither legislators nor judges are free to overleap it.' (Matter of Doyle, 257 N. Y. 244, 250.) Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding Justice Lazansky in Matter of Ellis (258 App. Div. 558, 572), expressing the minority view at the Appellate Division: 'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."

In Matter of Kaffenburgh (1c. Y. Y. 49, 53) the Court of Appeals quoted with approval the following language [fol. 108] from People ex rel. Taylor v. Forbes (143 N. Y. 219, 228): "no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained."

If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accusers, cross-examine witnesses, called witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as the court deems

proper. Absent such proceeding, the respondent has been denied his rights under the Constitutions of this State and of the United States.

The proceeding should be dismissed.

[fol. 109]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION-SECOND JUDICIAL DEPARTMENT

#### STIPULATION WAIVING CERTIFICATION

It Is Hereby Stipulated that the foregoing are true and correct copies of (1) the Notice of Appeal, (2) the Order Appealed From, (3) the Order to Show Cause dated July 13, 1959, and Petition dated July 9, 1959, in support of said Order to Show Cause, together with Exhibits A, B, C and D annexed thereto, (4) Appellant's Answer verified on July 31, 1959, (5) Majority opinion, concurring opinion, and dissenting opinion of the Appellate Division, Second Department, all dated December 31, 1959, all of which are on file in the office of the Clerk of the Appellate Division, Second Department, and it is

Further Stipulated that the exhibits offered and received in evidence during the proceedings in this matter not printed in this record may be produced and used by either of the parties herein on the argument of this appeal or in the briefs submitted thereon with the same force and effect as if printed in the record on appeal, and it is

Further Stipulated that certification by the Clerk of the Appellate Division, Second Department of the foregoing record is hereby waived.

Denis M. Hurley, Attorney-Pro se, Respondent.

David F. Price, Attorney for Appellant.

Dated: January 15, 1960.

[fol. 110]

IN THE SUPREME COURT OF NEW YORK .

APPELLATE DIVISION

In the Matter of Albert Martin Cohen, an attorney, Respondent.

DENIS M. HURLEY, Petitioner.

ORDER ON MOTION FOR A STAY-January 21, 1960

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an order directing that the respondent Albert Martin Cohen (admitted Second Judicial-Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and the respondent Albert Martin Cohen having filed an answer, herein, and after due deliberation having been had thereon, this court, by order dated and entered December 31st, 1959, having ordered that by reason of the misconduct established by the evidence the said Albert Martin Cohen be disbarred and removed from the office of attorney and counselor at law and that the name of said Albert Martin Cohen be struck from the roll of attorneys of the State of New York, etc., and the said respondent, Albert Martin Cohen, having moved for an order staying the operation of the order of disbarment herein pending the respondent's appeal to the Court of Appeals of the State of New York, and for such other and further relief as to the court may seem just and proper, and the said motion having come on to be heard by an order to show cause, dated January 8th, 1960.

Now on reading and filing said order to show cause, the [fol. 111] affidavit of David F. Price, and the answering affidavit of Denis M. Hurley, and the said motion having been argued by Mr. David F. Price of Counsel for respon-

dent, and argued by Mr. Michael Caputo of Counsel for petitioner, and due deliberation having been had thereon:

It is Ordered that the said motion to stay the operation of the order of disbarment entered December 31, 1959, pending appeal to the Court of Appeals, be and the same hereby is granted on condition that respondent be ready to argue or submit the appeal at the next term of the Court of Appeals, and this court hereby certifies that a constitutional question is directly involved and, therefore no undertaking is required as a condition to the granting of this stay (cf. Civ. Prac. Act, Sections 598-a, 593).

#### Enter:

John J. Callahan, Clerk.

[fol. 114]
IN THE COURT OF APPEALS OF NEW YORK

In the Matter of Albert Martin Cohen, an Attorney, Appellant.

DENIS M. HURLEY, Respondent.

#### Opinion-April 1, 1960

DESMOND, Ch. J. By an order of the Appellate Division, Second Department (one Justice dissenting) petitioner, admitted to the Bar in 1922, has been disbarred from the practice of law. The disbarment order was made after a hearing and on findings that he had refused to answer pertinent questions put to him during a "Judicial Inquiry and Investigation" (Judiciary Law, § 90) ordered by the Appellate Division and held before a Supreme Court Justice assigned by that court. The "Inquiry and Investigation" was concerned with charges of alleged illegal, corrupt and unethical practices and of alleged conduct prejudicial to the administration of justice, by attorneys and others acting with them, in the County of Kings, where appellant had his law office. Appellant's refusal to answer was on the stated ground that the answers might tend to incriminate him. On this appeal he argues that the disbarment order was, contrary to law and in violation of his right to due process of law, made solely because of his refusing to answer questions, in good-faith reliance on his constitutional privilege (N. Y. Const., art. I, §6) against self incrimination. The Appellate Division held that he was not disciplined for invoking his constitutional privilege but because, in his capacity and status as a lawyer, he had deliberately breached his inviolable and absolute duty to co-operate with the court in a valid and proper investigation of unethical practices. A lawyer, wrote the Appellate Division, "cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical [fol. 115] practices, and yet be permitted to retain his privilege of membership in an honorable profession."

There is no dispute as to the facts and no real dispute as to the legality of this kind of general investigation or "Judicial Inquiry" (Judiciary Law; § 90; People ex rel. Karlin v. Culkin, 248 N. Y. 465). On two occasions appellant appeared before the Supreme Court Justice presiding at the inquiry. He was represented by his own counsel. The counsel for the inquiry explained the nature of and authority for the inquiry. Appellant and his attorney were informed by the inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see Anonymous v. Baker, 360 U.S. 287, 291; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 479, supra), that there were no respondents or defendants, that appellant was "not being charged with anything" but was to be questioned as to pertinent facts, "within the scope of the Inquiry" and which were thought to "bear on or relate to your professional conduct", also that counsel for the inquiry had "information that indicates your participation in professional misconduct".

Counsel for the inquiry then put into evidence, 228 "Statements of Retainer" which during the years 1954 through 1958 appellant had filed with the Appellate Division in obedience to its Special Rule 3 which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the court and, if he enters into five or more

such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained. Put into evidence, also, when appellant appeared before the judicial inquiry were 76 other such statements of retainer filed during the same period by the law firm of Cohen & Rothenberg, with which appellant apparently had some association. Counsel for the inquiry, informed appellant and the court that all these retainer statements were offered in evidence "as a basis for some of the questions to follow".

Appellant answered a few preliminary questions as to how long and where he had practiced law. About 60 other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel who was present in court, he refused to answer any of them (except questions as to whether he had failed in any case to comply with Special Rule 3 and except as to questions about maintaining a separate office bank account) on the ground that answers might tend to incriminate or degrade him or expose him to a penalty or forfeiture. Those unanswered questions related to the 4dentity of his law office partners, associates and employees, to his possession of the records of the [fol. 116] cases described in his statements of retainer; to any destruction of such records, to his bank accounts, to his paying police officers or others for referring claimants to him, to his paying insurance company employees for referring cases to him, and to his promising to pay to any "lay person". 10% of recoveries or settlements. He was asked-and refused to answer-as to whether he had made or agreed to make such payments to any of several named persons, as to whether he had hired or paid nonlawyers to arrange settlements of his cases with insurance companies and as to whether his partner of associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-a and 270-d of the Penal Law which forbid the solicitation of legal business or the employment by lawyers of such solicitors. At one stage of this questioning counsel for the inquiry pointedly called to appellant's attention section 90 of the Judiciary Law which gives the Appellate Divisions power and control

over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice. At that time the inquiry's counsel cited Canon 22 of Professional Ethics requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inferm the court thereof, Canon 34 outlawing division of fees except with other lawyers; also sections 270-a, 270-e, 270-d and 276 of the New York Penal Law, all relating to soliciting and fee splitting. Counsel for the inquiry warned appellant and his counsel that "serious consequences" might flow from his refusal to answer by way of a "recommendation to the Appellate Division." Appellant's counsel replied that he was relying on Matter of Grae (282 N. Y. 428) and Matter of Ellis (282 N. Y. 435) as holding that there could not be any "consequence" to lawyers for "doing what they had an absolute legal right to do". Appellant was given a further opportunity to answer but persisted in his refusal, all this being admitted in his pleading in this proceeding.

The Supreme Court Justice presiding at the judicial inquiry then filed with the Appellate Division a transcript of the proceedings before him with a recommendation that disciplinary proceedings be instituted against appellant. The Appellate Division prected respondent Hurley, counsel to the inquiry, to commence this disbarment proceeding: Appellant's answer says that there is only an issue as towhether he was within his rights under section 6 of article I of the New York State Constitution, in pleading the privilege. The case, however, is not so simple. Of course, he had the right to assert the privilege and to withhold the criminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his immunity (Matter of Ellis. [fol. 117] 282 N. Y. 435, supra). But the question still remained as to whether he had broken the "condition" on which depended the "privilege" of membership in the Bar (See Judge Cardozo in Matter of Rouss, 221 N. Y. 81, 84). "Whenever the condition is broken, the privilege is lost" (Matter of Rouss, supra, pp. 84-85). Appellant as a citizen

could not be denied any of the common right of citizens. But he stood before the inquiry and before the Appellate-Division in another quite different capacity, also. As a lawyer he was "an officer of the court, and like the court itself, an instrument \* \* \* of justice" (Chief Judge Carpozo in People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470-471, supra), with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, Monest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to co-operate. Such "cooperation" is a "phrase without reality" as Chief Judge Cardozo wrote in People ex rel. Karlin v. Culkin (supra. p. 471) if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court:

The solution to our problem is clear when we consider the lawyer's special position. "The court's control over a lawyer's professional life derives from his relationship to \* \* \* the court" (Theard v. United States, 354 U. S. 278, 281). "Membership in the bar is a privilege burdened with conditions" (Matter of Rouss, 221 N. Y. 81, 84, supra). Those conditions must not be arbitrary but the proper and . appropriate ones are numerous. An attorney's contractual right to collect as fees a percentage of settlements or recoveries may validly be limited by court rule (Gair v. Peck. 6 N. Y. 2d 97, cert. denied 361 U. S. 374). He may be required to represent, without fee, indigent defendants: He cannot solicit retainers or employ others to solicit them for him, or divide his fees with laymen (Penal Law, \$\\$270-a, \\$ 270-b, 270-c, 270-d, 276). If he knows of such practices by others, he must inform the court (Canon 29). He must be candid and frank with the court at all times (Canon 22). Not only must be meet educational requirements and prove his character and fitness before being admitted to the Bar but he is subject throughout his professional life to investigation as to whether he continues in the possession of those qualities (Judiciary Law, § 90).

The key word is "duty" and the imposition on a lawyer by tradition and positive law of strict and special duties produces this situation where, at the very time that he is

exercising a common privilege of every citizen in refusing to answer incriminating inquiries, he is failing in his duty as a lawyer and endangering his professional life. Breach of the special duty brings a special penalty. Lawyers are [fol. 118] not the only citizens whose duty to answer is inconsistent with the exercise of the constitutional privilege. So it is with police officers (Christal v. Police Comm., 33: Cal. App. 2d 564; Canteline v. McClellan, 282 N. Y. 166) and with certain other public employees (Matter of Lerner v. Casey, 2 N. Y. 2d 355, affd. 357 U, S. 468; Beilan v. Board of Educ., 357 U.S. 399). The latest in this line of decisions is Nelson and Globe v. County of Los Angeles (- U. S. -, decided February 29, 1960, 28 Law Week 4159). Nelson and Globe had been ordered by their employer, the county, to answer any questions asked of them by a Congressional subcommittee before which they had been subpoenaed. There was a California statute making it the duty of any public employee so subpoenaed to answer any questions as to his membership in any organization advocating the forceful overthrow of the United States, Government, etc. Nelson and Globe refused to answer the subcommittee's questions on Fifth Amendment grounds and they were thereupon discharged from their county employment. The United States Supreme Court, following Beilan and Lerner (supra), held that they had been validly separated from their employment not for invoking their constitutional privilege but for insubordination under California law. The majority opinion in the Supreme Court stated that, if these men had simply refused without more to answer the subcommittee's questions, the county could certainly have discharged them and the fact that they chose to place their refusal on a Fifth Amendment claim put the matter in no different posture since their assertion of that claim was not used as a basis for drawing an inference of guilt. In those cited cases the duty to co-operate in investigations by answering relevant questions was found in statutes or constitutions. The lawyer's duty is found else-, where-in the common law and in the Canons of Ethicsbut it is just as plainly written. In this State a lawyer on admission to the Bar takes the same oath as does a public official (see Judiciary Law, § 466).

The idea that invocation of basic constitutional rights may result, for other reasons, in forfeiture of office or privilege is not a new one. Justice Holmes' aphorism has become famous: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" (McAuliffe v. New Bedford, 155 Mass. 216, 220). The Federal Hatch Act, denying to governmental employees their right of political activity, on pain of dismissal, has been held valid (United Public Workers v. Mitchell, 330 U.S. 75).

Appellant's reliance is on Matter of Grae (282 N. Y. 428. supra); Matter of Ellis (282 N. Y. 435, supra); Matter of Solovei (276 N. Y. 647) and Matter of Kaffenburgh (188 N. Y. 49). None of those decisions controls us here. The precise question in Grae and Ellis (supra) was as to whether a lawyer who offered to answer all pertinent [fol. 119] questions could be compelled in such an investigation to waive immunity in advance of questioning. The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented. Likewise as to Kaffenburgh and Solovei (supra): Kaffenburgh's refusal to testify was at a criminal trial (so in Matter of Cohen, 115 App. Div. 900) and Solovei's was before a grand jury. Our present appellant by declining to answer may have escaped criminal prosecution and punishment, but he could never, while a member of the Bar, escape the other consequences of his flagrant breach of his absolute duty to the court whose officer he was. That breach was in itself "professional delinquency" (Ex parte Garland, 71 U. S. 333, 379) and a valid reason for depriving appellant of his office as attorney.

The order appealed from should be affirmed, without costs.

Fuld, J. (dissenting). In order to appreciate the force of today's decision, it must be borne in mind that we are concerned not with the necessarily vague contours of the Due

Process Clause of the Federal Constitution, but with the specific provision of the Constitution of this State that no person shall be compelled to be a witness against himself (art. I. § 6). Recent Supreme Court decisions (Lerner v. Casey, 357 U. S. 468; Beilan v. Board of Educ., 357 U. S. 399; and Nelson and Globe v. County of Los Angeles, decided Feb. 29, 1960, — U. S. —), whatever their bearing on the present problem, are, therefore, not dispositive of this case. In other words, whether or not this disbarment violates federal constitutional guarantees-and for reasons previously expressed (e.g., Matter of Lerner v. Caseu. 2 N. Y. 2d-355, 373, dissenting), I believe that it does-we need not resolve the federal question. The case before us may and should be decided, as were Matter of Grae (282 N. Y. 428) and Matter of Ellis (282°N. Y. 435), on an interpretation of our own Constitution, article I, section 6.

I agree that "strict and special duties" have been imposed on a lawyer (opinion, p. 496). I cannot, however, persuade myself that a lawyer's refusal to answer questions, even before a judicial inquiry, on the constitutionally permissible ground that to do so would incriminate him, may be said to constitute a violation of any such duty. (See Matter of Grae, 282 N. Y. 428, supra; Matter of Ellis, 282 N. Y. 435, supra; see, also, People ex rel. Karlin v. Culkin, 248 N. Y. 465, 471.) In the Grae and Ellis cases, the court held that under our State Constitution an attorney's refusal to signa waiver of immunity-his refusal to forego reliance on the privilege-could not constitute a ground for disbarment, even though the refusal occurred during the course of a [fol. 120] judicial inquiry similar to the one which here concerns us.1 There, too, it was argued that failure to answer was a violation of the lawyer's duty of co-operation

Indeed, in the Ellis case (282 N. Y. 435, supra), the court pointed out that Ellis, "appearing as a witness at the inquiry, not only declined to sign a waiver of immunity • • • but in addition • • • declined to answer any questions upon the ground that such answers would tend to incriminate or degrade him" (p. 437; sec. also, 258 App. Div., at p. 559). Although Ellis later wrote a letter stating that, while he stood upon his refusal to sign a waiver, he was "willing" to answer questions put to him, the significant fact is not only that he never did appear as a witness, but that his refusals to answer questions went unpunished.

with the court. We rejected that argument and, in the words of presiding Justice Lazansky who had dissented in the Appellate Division, forthrightly declared that (282 N.Y., at p. 435)

"'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.'"

And, therefore, concluded the court (p. 435),

"It follows that " " the present disciplinary proceeding instituted against the appellant, wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable."

The attorneys Grae and Ellis ultimately offered to answer all questions, put to them, but, the record makes clear, the offer was based not on a surrender of immunity, but on the specific condition that immunity be granted by their being compelled to answer questions that might incriminate them. It was for the very reason that the court was unwilling to have immunity conferred on them that it declined to put questions to them without first obtaining a waiver of immunity. Analysis of our opinion, as well as the dissent of Presiding Justice LAZANSKY (258 App. Div., at pp. 567-575)—which this court explicitly approved (282) N. Y., at p. 434)—demonstrates that this court was not merely passing on the consequences of a momentary lapse of courtesy, but was deciding the very point in issue today. Pointedly noting that "the single offense charged | against Graef is his refusal to yield a constitutional privilege", the court unequivocally announced that "its exercise cannot be a breach of duty to the court" (282 N. Y., at p. 435).

The attorneys who refused to sign waivers of immunity in those proceedings were not, I am confident, any more cooperative or any more mindful of their "strict and special duties" or of their privileged posts in the affairs of men than the present appellant. And, I venture, the motives which prompted Grae and Ellis to assert their privilege were no different from those of the appellant.

Nor do Matter of Grae and Matter of Ellis stand alone in holding that an attorney's claim of privilege may not be treated as professional misconduct warranting disciplinary action.

[fol. 121] The question now before us first came to this court in 1907 in Matter of Kaffenburgh (188 N. Y. 49). Kaffenburgh was called as a witness on the trial of his employer for conspiracy to obstruct justice. He was asked questions relating to his possible participation in the conspiracy and declined to answer on constitutional grounds. This was one of the charges on which his disbarment was later sought, and as to it this court wrote (p. 53): "The defendant \* \* \* had the right to refrain from answering any question which might form the basis of or lead to the prosecution of himself or a forfeiture of his office of attorney and counselor at law. . . We are therefore, of the opinion that no offense was stated in the first charge?. The court's opinion herein attempts to distinguish Kaffenburgh upon the ground that it involved a trial and not an inquiry into the conduct of lawyers. In point of fact, it was the most serious kind of inquiry into the conduct of lawyers, taking, as it did, the form of a criminal prosecution. The questions put to Kaffenburgh dealt solely with. his conduct in the practice of the law and, certainly, he was as much an officer of the court conducting the trial as the appellant here was of the court conducting the judicial inquiry.

Ten years later came Matter of Rouss (221 N. Y. 81), also cited by the majority. That decision, far from over-ruling Kaffenburgh on this point, actually confirmed it, for the court explicitly declared that "the charge was made that the refusal to answer was professional misconduct. That charge was not sustained either in the Appellate Division or in this court" (p. 90)

sion or in this court" (p. 90).

Twenty years after Rouss came Matter of Solovei (276 N. Y. 647, affg. 250 App. Div. 117). As a result of asserted irregularities in connection with a murder investigation in which the respondent therein represented one of the suspects, the Governor appointed an Extraordinary Special and Trial Term of the Supreme Court and a grand jury was drawn for that term. It indicted three persons

for murder and, some time later, it also indicted certain others, including an office associate of the respondent, for the crime of conspiracy to obstruct justice. The respondent, named as a coconspirator, declined to waive immunity when questioned by the grand jury. That body thereupon presented charges to the Appellate Division. That court dismissed the charges, stating that "Matter of Kaffenburgh \* \* decided that an attorney who in good faith refused to answer questions on the ground that they might tend to incriminate him was not amenable to disciplinary proceedings" (250 App. Div., at p. 121): The Appellate Division also commented on the nature of the proceedings, noting that, if it was not a breach of duty to the court to refuse to co-operate with it in a public trial, as in Kaffenburgh, it was surely no breach to claim the privilege in a private hearing (p. 120). As indicated, we affirmed without opinion: [fol. 122] Although the court in this case places considerable reliance upon People ex rel. Karlin v. Culkin Copinion, p. 495), it is noteworthy that that case did not involve a claim of privilege; the attorney simply refused to be sworn or testify. In affirming an order adjudging him in contempt, the court spoke of the duty of "co-operation" owed by an attorney in an inquiry such as the present, but it was careful to indicate that such "co-operation" on the part of the lawyer was "subject to his claim of privilege" (248 N. Y., at p. 471).

It is hardly necessary to say that a scrupulous regard for the constitutional limitation will not leave the disciplinary anthority powerless or a guilty attorney immune. If, as counsel for the judicial inquiry stated toward the conclusion of the investigation, there was information indicating the appellant's "participation in professional misconduct", his unwillingness to testify might have justified institution of a disciplinary proceeding founded on the information at hand. And, if such proceeding were to be brought and the appellant were to stand mute, therein, he would have to bear all of the legitimate inferences stemming from the damaging evidence adduced against him. It is also relevant that, where immunity is conferred—by overriding the claim of privilege and compelling the witness to answer the ques-

tions—and the testimony shows that he is not fit to continue as a lawyer, he may then be disbarred or otherwise disciplined. (See Matter of Rouss, 221 N. Y. 81, 86 et seq.,

supra.)

In the present case, however, the appellant's claim of privilege was the sole ground relied upon to disbar him, and this fact cannot be altered or disguised by styling his conduct a "refusal to co-operate with the court". It is to substance, that we must look, not to form or labels. The courts should not sanction so easy an avoidance of a constitutional guarantee of a fundamental personal right.

To the charge that it is unthinkable that a lawyer "canretain his status and privileges as an officer of the court"
after claiming his privilege (opinion, p. 495), I would answer, as did Mr. Justice Lazansky in his dissent in Matter
of Ellis (258 App. Div. 558, 573, supra), that the charge
"is based upon false assumption. Defiance and affront
the cannot be when the act has the sanction of the fundamental law of the land". It is, in short, my view that not
only section 6 of article I of our Constitution but the decisions of this court considering and construing it require us
to set aside the order of disbarment. Failure to do so can
only mean that time has eroded the importance and vitality
of the constitutional privilege against self incrimination.

I would reverse the order of the Appellate Division.

Judges Dye, Froessel, Van Voorhis, Burke and Foster concur with Chief Judge Desmond: Judge Fuld dissents in a separate opinion.

Order affirmed.

[fol. 123]

IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR-April 1, 1960

[fol. 124]

No. 30

In the Matter of Albert Martin Cohen, an attorney, Appellant,

DENIS M. HURLEY, Respondent.

Be It Remembered, That on the 25th day of January in the year of our Lord one thousand nine hundred and sixty, Albert Martin Cohen, an attorney, the appellant in this cause, came here unto the Court of Appeals, by David F. Price, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Denis M. Hurley, the respondent in said cause, afterwards appeared in said Court of Appeals in person.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 125] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Theodore Kiendl, of counsel for the appellant, and by Mr. Michael A. Castaldi, of counsel for the respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

[fol. 126] Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, )
Albany, April 1, 1960.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 127]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION

In the Matter of Albert Martin Cohen, an attorney, Appellant,

DENIS M. HURLEY, Respondent.

ORDER ON REMITTITUR FROM COURT OF APPEALS
-April 11, 1960

The above named Albert Martin Cohen, the appellant in this proceeding having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division, Supreme Court, Second Judicial Department, entered in the office of the Clerk of said Court on the 31st day of December, 1959, which disbarred appellant from the practice of the law and directed that his name be struck from the roll of attorneys of the State of New York as of the date of entry of said order, one Justice dissenting, with leave to appellant to apply to vacate said order upon proof that, within 30 days after the entry of said order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

And the said appeal having been heard in the Court of Appeals, and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be affirmed, without costs, and having further ordered that the record and proceedings herein be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be [fol. 128] proceeded upon according to law:

Now on reading the remittitur from the Court of Appeals of the State of New York dated April 1st, 1960, it is

Ordered, that the order of the Court of Appeals of the State of New York, be and the same hereby is made the order of this Court.

Enter:

Gerald Nolan, Presiding Justice.

[fol. 129]

IN COURT OF APPEALS OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 275

In the Matter of Albert Martin Cohen, an attorney, Appellant,

DENIS M. HURLEY, Respondent.

ORDER AMENDING REMITTITUR April 21, 1960

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers lraving been submitted thereon and due deliberation having been thereupon had:

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: "The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against selfincrimination in an non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment." The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated.

And the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, is hereby requested to [fol. 130] return said remittitur to this Court for amendment accordingly.

A copy.

Gearon Kimball, Deputy Clerk.

### IS THE SUPREME COURT OF NEW YORK

#### APPELLATE DIVISION

In the Matter of Albert Martin Cohen, an attorney, Respondent,

DENIS M. HUBLEY, Petitioner:

ORDER ON MOTION FOR'A STAY-April 27, 1960

The above named Albert Martin Cohen, an attorney; having been disbarred by an order of this court dated and entered December 31st, 1959, and his name directed to be . struck from the roll of attorneys of the State of New York as of the date of entry of said order, one Justice dissenting. with leave to appellant to apply to vacate said order upon proof that, within 30 days after the entry of said order. he has answered before the Justice presiding at the Judicial Inquiry, all relevant questions and has produced. before such Justice all relevant records in accordance with the subpeena duces tecum heretofore served, and by an order of this court dated and entered January 21st, 1960, respondent's motion to stay the operation of said order of disbarment pending appeal to the Court of Appeals having been granted, on condition that respondent be ready to argue or submit the appeal at the next term of the Court of Appeals, and having certified that a ce-titutional question was directly involved and no undertaking was required as a condition to the granting of the stay, and the said Albert' Martin Cohen, respondent, having appealed to the Court of Appeals of the State of New York from said order of disbarment of this court, and the said Court of Appeals by remittitur dated April 1st, 1960, having ordered and adjudged that the said order of disbarment of this court so appealed from be affirmed, without costs, and having [fol. 132] further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon

according to law, and this court by order dated and entered April 11th, 1960, having made the order of the Court of Appeals the order of this court, and the said Court of Appeals of the State of New York on April 25th, 1960. having requested the return of said remittitur, so as to recite that upon the appeal questions under the Constitution of the United States had been presented and necessarily passed upon by said court, and to conform to that court's decision of April 21st, 1960, granting motion of Albert Martin Cohen, respondent, to amend remittitur, and the respondent having moved in this court for an order staying the operation of the order of disbarment of this court dated and entered December 31, 1959, pending the hearing and determination by the United States Supreme Court, upon the application of respondent to that court, of a petition for a writ of certiorari intending to bring the said order of disbarment of this court dated December 31, 1959; before the said Supreme Court of the United States for review. and for such other and further relief as to the court may seem just and proper, and the said motion for a stay having come on to be heard by an order to show cause dated April 15, 1960.

Now on reading and filing said order to show cause, the affidavit of Theodore Kiendl in support of said motion, and the affidavit of Denis M. Hurley in opposition thereto, and all the papers filed herein, and the said motion having been argued by Mr. Theodore Kiendl of Counsel for respondent Albert Martin Cohen, and argued by Mr. Denis M. Hurley, petitioner in person, and due deliberation having been had thereon:

It is Ordered that the said motion for a stay be and the same hereby is denied.

Nolan, P.J., Beldock, Ughetta and Christ, J.J., concur: Kleinfeld, J., dissent, and votes to grant the motion.

#### Enter,

John J. Callahan, Clerk.

[fol. 134]

#### IN THE SUPREME COURT OF NEW YORK

#### APPELLATE DIVISION

In the Matter of Albert Martin Cohen, an attorney, Appellant,

DENIS M. HÜRLEY, Respondent.

ORDER ON AMENDED REMITTITUR FROM COURT OF APPEALS

—April 28, 1960

The above named Albert Martin Cohen, the appellant in this proceeding having appealed to the Court of Appeals he State of New York from an order of the Appellate Division, Supreme Court, Second Judicial Department, entered in the office of the Clerk of said Court on the 31st day of December, 1959, which disbarred appellant from the practice of the law and directed that his name be strack from the roll of attorneys of the State of New York as of the date of entry of said order, one Justice dissenting, with leave to appellant to apply to yacate said order upon proof that, within 30 days after the entry of said order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

And the said appeal having been heard in the Court of Appeals, and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be affirmed, without costs, and having further ordered that the record and proceedings herein be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law; and the said Court of Appeals of the State of New York on April 25th, 1960, having requested the return of said remittitur, so as to [fol. 135] recite that upon the appeal questions under the

constitution of the United States had been presented and necessarily passed upon by said court, and to conform to that court's decision of April 21st, 1960, granting motion of appellant, Albert Martin Cohen, to amend remittitur, and the said remittitur having been amended by adding thereto the following:

"Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: 'The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in an non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment.' The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated."

Now on reading the remittitur from the Court of Appeals of the State of New York dated April 1st, 1960, as amended by order dated April 21st, 1960, it is

Ordered that the order of the Court of Appeals contained in said amended remittitur, be and the same hereby is made the order of this court.

#### Enter:

Gerald Nolan, Presiding Justice.

[fol. 137] Clerk's Certificate (omitted in printing).

[fol. 138]

### Supreme Court of the United States No. 921, October Term, 1959

ALBERT MARTIN COHEN, Petitioner,

VS. .

DENIS M. HURLEY.

ORDER ALLOWING CERTIORARI-June 6, 1960

The petition herein for a writ of certiorar: to the Court of Appeals of the State of New York is granted. The case is transferred to the summary calendar and set for argument immediately following No. 661.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

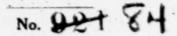
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IN THE

## Supreme Court of the United States

October Term, 1959



Petitioner.

DENIS M. HURLEY.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE

Theoretee Kiendl Counsel for Petitioner 15 Broad Street New York 5, N. Y.

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# Supreme Court of the United States

October Term, 1959

No.

In the Matter of ALBERT MARTIN COHEN,

Petitioner.

DENIS M. HURLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE

Petitioner, Albert Martin Cohen, respectfully prays for a writ of certiorari to review the final judgment of the Court of Appeals of New York, affirming an order of the Appellate Division, Second Department, permanently disbarring petitioner from the practice of the law.

### Citations to Opinions Below

The majority, concurring and dissenting opinions of the Appellate Division, Second Department are reported in 9 (A. D. 2d 436; 195 N. Y. S. 2d 990, and are printed as Appendix A hereto, *infra*, pp. 20-43. The Appellate Division's stay of its order of disbarment pending final judg-

ment by the Court of Appeals of New York is reported in 10 A. D. 2d 581; 196 N. Y. S. 2d 277, and is printed as Appendix B hereto, in/ra, pp. 44-46. The majority and dissenting opinions of the Court of Appeals of New York are not yet officially reported and are printed as Appendix C hereto, in/ra, pp. 47-62. The Court of Appeals' remittitur to the Appellate Division is not officially reported and is printed as Appendix D hereto, in/ra, pp. 63-64. The order of disbarment, dated December 31, 1959 is printed as Appendix E hereto, in/ra, pp. 65-67).

#### Jurisdiction

The judgment of the Court of Appeals of New York was entered on April 1, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

# **Questions Presented**

Whether a state may, consistent with the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, permanently disbar an attorney in the absence of any evidence of professional misconduct or bad character, but solely because he refused, in good faith and relying on the advice of competent counsel, to answer questions before a general judicial inquiry in reliance on his privilege against self-incrimination.

#### Constitutional Provision Involved

Amendment XIV, United States Constitution, Section 1, Clause 2:

. . nor shall any State deprive any person of liberty, or property without due process of law

#### Statement

On January 21, 1957, the Appellate Division, Second Department, ordered a general judicial inquiry (hereinafter called the "Inquiry") intosolicitation and related practice in the County of Kings, New York (R. 23-28). From March 1957 to June 1958 the Inquiry's staff examined informally about 2,500 persons. See Anonymous v. Baker, 360 U. S. 287, 292. Subsequently, petitioner, in response to subpoenas served upon him, appeared before the Inquiry on October 28, 1958 before Mr. Justice Arkwright and on May 19, 1959 before Mr. Justice Baker (R. 29, 37).

During the course of his interrogation, petitioner was assured by the Inquiry that he had not been called as a. prospective defendant or respondent (R. 30, 43); that the Inquiry was not an adversary proceeding (R. 43); and that, he was not being charged with having committed any of the illegal practices with which the Inquiry was concerned (R. 42). However, he was informed by the Inquiry's interrogator that, " . . . we have information that indicates your participation in professional misconduct . . . " (R. 43), and the nature of many of the questions asked conveyed the suggestion that statements adverse to petitioner had been made by one or more of the numerous unidentified witnesses previously examined by the Inquiry's staff. Nevertheless, no evidence of petitioner's professional misconduct was ever produced, no further description of the allegedly adverse information was ever provided, and no source was ever identified. Thus, petitioner had no opportunity to confront or cross-examine his alleged accusers.

This was the character of the proceeding in which petitioner heeded his counsel's advice to invoke his constitutional privilege against self-incrimination. Indeed, under these adverse circumstances, petitioner answered a number of questions and indicated a willingness to answer more, but yielded to his counsel's admonition to refrain from doing so lest he waive his constitutional privilege. Thus, at R. 58,

"Mr. Price: I told you not to answer. You said you wanted to answer, so go ahead and answer. The Witness: I have to take my counsel's advice. If I answer it, you said it may be deemed a waiver.

Mr. Price: That is why I said make the same answer.

The Witness: Well, then specifically upon my counsel's advice, the answer is the same."

It is conceded that petitioner's assertion of the privilege was neither contumacious nor contemptuous, but was in good faith (Appendix A, infra, p. 20).

Notwithstanding petitioner's unblemished record of thirty-seven years at the bar, respondent, the Inquiry's attorney, petitioned the Appellate Division on July 9, 1959, to discipline petitioner solely for his refusal to waive his privilege against self-incrimination by testifying (R. 7, 19).

No charges were made on the basis of the allegedly adverse evidence which respondent claimed to possess. In his brief before the Appellate Division, respondent indicated that it was cheaper and quicker to proceed as he did than to incur the "expenditure of time, energy and money" (Re-

In the course of the Inquiry, petitioner for the same reason refused to produce certain records demanded by a subpoena duces tecum. The issues raised by this refusal have been treated throughout these proceedings as identical to those raised by the refusal to testify.

spondent's Brief; p. 20) that wou'd be entailed in proving a case of professional misconduct based on this alleged evidence. Accordingly, no hearing was held on the charges of professional misconduct intimated by respondent, and the sole issue before the Appellate Division was whether the uncontested fact that petitioner had refused to waive his constitutional privilege by testifying warranted disciplinary action.

Petitioner, on July 31, 1959, in his Answer to Respondent's Petition, explicitly asserted that disciplinary action would violate his rights under the due process-clause of the Fourteenth Amendment to the United States Constitution. Thus the Answer stated in part (R. 84-85):—

# "Respondent Alleges Affirmatively:-

respondent for asserting said privilege against selfincrimination would be a denial to him of due process in violation of his rights under . . . the 14th Amendment of the Constitution of the United States . . .

"The right to practice law is a right of liberty and property protected by the Fourteenth Amendment to the Constitution of the United States."

The Appellate Division, Second Department, one justice dissenting, rejected petitioner's contention and held that his refusal to answer, even though based on his reliance in good faith and on advice of competent cour el, on his constitutional privilege against self-incrimination, constituted professional misconduct warranting permanent disbarment (Appendix A, infra, p. 20). The order of disbarment was entered on December 31, 1959 (Appendix E, infra, p. 65). On January 21, 1960, the court, expressly stating that

constitutional questions were involved in this case, granted petitioner's motion staying the disbarment order pending appeal and final determination of the issues by the Court of Appeals (Appendix B, infra, p. 44).

On April 1, 1960, the Court of Appeals, one judge dissenting, affirmed the disbarment order below, noting that petitioner had urged that he had been deprived of his rights without due process of law (Appendix C, infra, p. 47). On April 21, 1960, the Court of Appeals amended its remittitur to the Appellate Division, Second Department, to state (Appendix D, infra, p. 63):—

"Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: "The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in a non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment." The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated."

# REASONS FOR GRANTING THE WRIT

#### POINT I

The question presented is similar to the question presented by Konigsberg v. State Bar of California, in which this Court recently granted certiorari.

After this Court's decision in Konigsberg v. State Bar of California, 353 U.S. 252, the Supreme Court of California held that the California Committee of Bar- Examiners was justified in refusing to recommend Konigsberg for admission to the bar solely because Konigsberg's refusal to answer the Committee's questions "revealed a lack of candor which constituted unfitness". 52 Cal. 2d 769; 344 P. 2d 777. This Court again granted certiorari on March 7, 1960 so that it might determine whether the action taken deprived Konigsberg of liberty and property without the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution (362 U.S. 910). Here the Court below affirmed the disbarment of petitioner solely on the ground that his refusal to answer the questions put in a general judicial inquiry breached his duty to "be candid and frank with the court at all times" (App. C).

Thus in Konigsberg v. State Eur of California, 52 Cal. 2d 769, 344 P. 2d 777, the court below held that a refusal to answer, disqualified an applicant for admission to the Bar, whereas here the court below held that a refusal to answer is a per se disqualification to continue the practice of the law by one already admitted. However worthy an attorney may be, however unassailable his character, the

California and New York courts would deny him membership in the Bar solely for refusing to answer questions put to him, in reliance upon Constitutional guarantees against self-incrimination.

To be sure, there are differences between Konigsberg v. State Bar of California, supra, and the instant case, but none detracts from the importance of the issue presented here. Indeed, the differences are all in the direction of greater importance here. Whereas Konigsberg was denied admission to the bar, petitioner was disbarred after thirty-seven years of practice, during which time his integrity was never questioned. As the Court of Appeals for the District of Columbia Circuit said in, In Re: Carter, 177 F. 2d 75, 78; vert. denied, 338 U. S. 900:

"An applicant for admission to the bar must satisfy the authorities as to his moral character, and custom has established confidential inquiry as an element of that procedure. But when he has been admitted, his removal from practice is a disbarment, about which elaborate procedural requirements are thrown. Such removal after admission is not a mere denial of an application for admission. The same is true in respect of licenses to do business in many forms. Prior to grant, many processes are available for inquiry and information. But, once granted, the license becomes a right, and due process of law must be followed to achieve deprivation."

If there is an important federal question presented by the denial of Konigsberg's application for admission to the bar, a fortiori the question presented by petitioner's disbarment is vitally important.

The cases also differ on the ground relied upon as justification for refusing to answer. Konigsberg refused to answer on the ground that the inquiries infringed rights guaranteed him by the First and Fourteenth Amendments; petitioner on the ground that his answers might tend to incriminate him. This difference, too, merely serves to emphasize the importance of the question presented here. If it is vital to determine whether a state denies due process of law when it closes the bar to an applicant who retuses to answer for a reason not yet held privileged, how much more important it is to determine whether a state denies due process of law when it disbars for a concededly privileged refusal to answer.

The cases differ in one more respect. Konigsberg's refusal occurred in the course of a hearing, the only purpose of which was to pass on Konigsberg's qualifications for admission to the bar. Petitioner's refusal occurred during a general inquiry to which he was not a party.

• The potential impact of the decision of the court below is thus much greater than that of the California court's decision. It would seem, for example, to extend to an attorney's refusal to give evidence before a grand jury.

#### POINT II

The Court below has resolved the question presented in a way that is inconsistent in principle with decisions of this Court.

It has long been established that the right to practice a profession or to pursue a particular line of private employment is entitled to constitutional protection and may not be taken away except by a proceeding that comports with all the essentials of procedural due process. E.g., Ex parte Robinson, 86 U. S. 505, 512; Ex parte Garland, 71 U. S. 339, 379; Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123; Parker v. Lester, 227 F. 2d 708, 717 (9th Cir.); Matter of Los Angeles County Pioneer Society, 217 F. 2d 190 (9th Cir.); In Re: Carter, 177 F. 2d 75, 78 (D. C. Cir.) cert. denied 338 U. S. 900; In Re: Carter, 192 F. 2d 15, 17 (D. C. Cir.) cert. denied 342 U. S. 862; Laughlin v. Wheat, 95 F. 2d 101 (D. C. Cir.); United States v. Hicks, 37 F. 2d 289 (9th Cir.); cf. Konigsberg v. State Bar of California, 353 U. S. 252; Schware v. Board of Bar Examiners, 353 U. S. 232, 238.

These cases make it clear that the mandate of due process requires a judicial type hearing at which the party whose rights are being determined is fully apprised of the charges against him and the evidence to support those charges; is permitted toxconfront and cross-examine witnesses; and is afforded an opportunity to offer evidence in explanation, rebuttal or mitigation. Consequently, if, in the absence of the judicial inquiry, respondent had sought to have petitioner disbarred, he would have been obliged to make specific charges of professional misconduct, present evidence in support of those charges, permit petitioner to cross-examine witnesses and present evidence of his own, and, finally, respondent would have had to sustain the burden of proving the charges.

Instead respondent employed a procedural short-cut that effectively deprived petitioner of all of these safeguards. Respondent interposed a preliminary inquiry that was

<sup>\*</sup> The inquiry was a "preliminary inquisition, without adversary parties". Anonymous v. Baker, 360 U. S. 287, 291,

plainly intended to present petitioner with a Hobson's Without providing petitioner with any specific charges, indeed without warning him at all that he would be called upon to defend himself and after informing petitioner that he had not been summoned in the role of a prospective defendant, respondent proceeded to question. petitioner in a way that clearly belied this disclaimer. Eventually respondent went so far as to inform petitioner that the Inquiry had information indicating professional misconduct on his part. But no such information was presented and petitioner was left in the dark as to the source of the information, its nature, and whether any steps had been taken to test its credibility. Petitioner was thus given the option of meeting an undisclosed case against him or of following the dictates of prudence and asserting his privilege against self-incrimination. When he naturally followed the advice of his attorney to take the latter course, respondent seized upon this as a substitute for an affirmative demonstration that petitioner had been guilty of professional misconduct and instituted disbarment proceedings.

If the judgment below is permitted to stand, it will serve as a model for those who would evade constitutional safeguards which this Court has been at great pains to preserve. The new procedure will be simply: summon the person whose license to practice law—or any other license for that matter—is sought to be revoked; make vague—threats about possessing adverse information so that the target will be moved to assert his privilege against self-incrimination; then revoke the license because the licensee has failed to cooperate with the investigation. In this way the inconvenience of presenting a case against the intended

victim can safely be avoided. That this is not an overdrawn picture of what occurred below is best indicated by respondent's statement in his brief before the Appellate Division that it was cheaper and quicker to proceed in this manner than to incur the "expenditure of time, energy and money" that would be necessary to make a case of professional misconduct against petitioner.

In dissent in the Appellate Division, Mr. Justice Kleinfeld indicated his belief that the course followed in this case denied petitioner due process of law. He said:

"If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accuser, cross-examine witnesses, call witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as the court deems proper. Absent such proceedings, the respondent has been denied his rights under the constitution of this state and of the United States."

And Mr. Justice Frankfurter's statement in his concurring opinion in Schware v. Board of Bar Examiners, 353 U.S. 232, 249, seems precisely in point:

"Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause. Such is the case here."

#### POINT III

The decision below conflicts with recent decisions of the Supreme Court of Florida.

In Sheiner v. Florida, 82 So. 2d 657, the Supreme Court of Florida reversed a judgment of disbarment based solely on an attorney's refusal to answer questions on the ground that the answers might tend to incriminate him. The court held that to disbar an attorney for refusing to answer because of his privilege would deprive him of due process of law. The court thus stated (82 So. 2d, at 661):—

"The last cited case [Matter of Murchison, 349 U. S. 133] and the Peters Case [Peters v. Hobby, 349 U. S. 331] are pertinent here for the emphasis they place on confrontation, cross-examination and fair trial as ingredients of due process. Confrontation and cross-examination under oath are essential to due process because it is the means recognized by which we test the probity of the evidence and eliminate that which is trumped up or of doubtful veracity. The 'faceless informer' theory of proof should never be substituted for confrontation and cross-examination in a trial where the end result is to deprive the accused of one of his most precious assets—the privilege to practice laws."

Subsequently, the same court rejected efforts to amend the rules dealing with the practice of law in Florida to permit disbarment for invoking the privilege against self-incrimination. It held that since the innocent may invoke this privilege, "its exercise may not be considered a breach of duty to the court". In Re: The Integration Rule of the Florida Bar, 103 So. 2d 873, 875. The Court therein relied on this Court's opinions in Konigsberg v. State Bar of Cali-

fornia, 353 °U. S. 252; Ullmann v. United States, 350 U. S. 422; and Slochower v. Board of Education, 350 U. S. 551. See also Quinn v. United States, 349 U. S. 155.

Significantly, on May 29, 1959, after considering the application of this Court's decisions in Lerner v. Casey, 357 U. S. 468 and Beilan v. Board of Education, 357 U. S. 399, upon which the courts below relied heavily, the Supreme Court of Florida reaffirmed its decision in the earlier Sheiner case to frustrate another attempt to disbar Sheiner for his invocation of the privilege. Florida v. Sheiner, 112 So. 2d 573. Cf. In Re: Holland, 377 Ill. 346, 36 N. E. 2d 543, where the Supreme Court of Illinois held on state grounds that the suspension of an attorney for assertion of the privilege constituted error.

The position of the Supreme Court of Florida stands as the direct antithesis of, and in square conflict with, that of the Court of Appeals of New York in the instant case. It is just impossible to reconcile the two decisions.

#### POINT IV

This Court has been persistently receptive to cases in which bar authorities have deprived attorneys or applicants of their rights.

This Court has repeatedly demonstrated its concern with the question of fairness in the admission and exclusion of members of the bar by granting writs of certiorari in such cases. E.g., Konigsberg v. State Bar of California, 353 U. S. 252, cert. regranted, March 7, 1960, 362 U. S. 910;

<sup>\*</sup> Prior to its final decision, the Supreme Court of Florida, on July 24, 1958, had ordered further argument limited to the application of Beilan and Lerner.

Schware v. Board of Bar Examiners, 353 U. S. 232; Application of Levy, 348 U. S. 978, summarily reversing 214 F. 2d 331 (5th Cir.); In Re: Summers, 325 U. S. 561, Cf. Exparte Garland, 71 U. S. 339; Exparte Robinson, 86 U. S. 505.

That concern is most appropriate. History is replete with the names of intrepid attorneys who have championed causes which at the time were unpopular in order to perpetuate the cause of freedom and democracy. The nation must be assured that,

"... the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself". Ex parte Secomb, 19 How. (U. S. 9).

As this Court stated in Konigsberg v. State Bar of California, 353 U. S. 252, 273:

"... A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers are unintimidated—free to think, speak, and act as members of an Independent Bar."

See also Cammer v. United States, 350 U.S. 399, 406-407.

#### POINT V

The question presented has not been resolved by this Court's decisions in cases involving public employees.

The court below relied in part upon this Court's decisions in Lerner v. Casey, 357 U. S. 468; Beilan v. Board of Education, 357 U. S. 399; and Nelson and Globe v. County of Los Angeles, 362 U. S. 1, decided February 29, 1960. The

import of these cases, all decided by a sharply divided court, is, that a state may constitutionally discipline a public employee paid by public funds for refusing to answer questions relevant to his employment even though the refusal is based upon his privilege against self-incrimination.

That these cases do not foreclose the question presented is most clearly indicated by this Court's later grant of certiorari in Konigsberg v. State Bar of California, 362 U.S. 910, after the California Supreme Court (52 Cal. 2nd 769) relied upon precisely the same line of authority relied upon by the courts below, viz the Lerner and Beilan cases.

Moreover, this Court has never suggested that a state possesses the same power over private citizens that it does over public employees. Quite the contrary, the difference between the two has long been recognized. For example, in Ex parte Garland, 71 U. S. 339, 378, this Court said:

"The profession of an attorney and counselor is not like an office created by an Act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution."

In Parker v. Lester, 227 F. 2d 708, the Court of Appeals for the Ninth Circuit, in holding unconstitutional a security program which summarily prevented merchant seamen from carrying on their vocation, stated (222 F. 2d, at p. 717):

"The liberty to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job . . . The plaintiffs here are citizens of the United States and the rights and liberties which they assert relate not to, any public employment present or prospective, but to their right to pursue their chosen vocations as merchant seamen."

Indeed, this Court in Commer v. United States, 350 U.S. 399, 406-407, quoted with approval the statement that an attorney has as good a right to the exercise of his profession,

the merchant to engage in the pursuits of commerce... The public have almost as deep an interest in the independence of the bar as of the bench."

Nor does an attorney's role as an officer of the court make him the equivalent of a public servant. In the Cammer case (350 U. S. at 405) this Court pointed out that, unlike other court officers such as marshals, bailiffs or clerks,

"... a lawyer is engaged in a private profession, important though it be to our system of justice. In general, he makes his own decisions, follows his own best judgments, collects his own fees and runs his own business."

Surely United Public Workers v. Mitchell, 330 U.S. 75, demonstrates the distinctive status of public employees. Although that case held that the United States may constitutionally discharge an employee for taking an active part in political activities, there can be no doubt that it would be unconstitutional to disbar an attorney for the same reason.

#### POINT VI

There are 38 attorneys whose right to practice will effectively be determined by the outcome of this case and numberless attorneys and others who will one day feel its impact.

Petitioner is not the only attorney who was sufficiently intimidated by the Inquiry to assert his privilege against self-incrimination. There were some 38 others (Respondent's Brief before Appellate Division, p. 20). This petition then, although the petition of but one attorney, vitally affects the professional status of many.

But even if petitioner stood alone today, there can be no doubt that the principle established by the judgment below will create plenty of company for him tomorrow. On the narrowest construction of the opinion below, any attorney who refuses to answer questions in reliance on his privilege against self-incrimination in the course of an inquiry into professional activities will hereafter be subject to disbarment. And it may be that the court below meant to inform the bar that any member will lose his right to practice if he relies upon his privilege against self-incrimination no matter what the nature of the proceeding. Indeed, the court below did not even limit its proscription of refusals to those based upon the privilege against self-incrimination.

Whatever the precise scope of the holding below, it is plain that if it is permitted to stand, we can look forward to the day when states will seek to deny and revoke licenses in all sorts of occupations because licensees have refused to cooperate with inquiries looking into matters relevant to the licensed occupation. In this connection, it is worth remembering the enormous range of state licensing activities. Are the livelihoods of physicians, bail bondsmen, hair dressers, morticians, restaurant owners, taxicab drivers and many, many others all to be constitutionally vulnerable to the kind of arbitrary treatment petitioner has received? If certiorari is granted in this case, it is to be hoped that this Court will never again have to decide that question.

# CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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#### APPENDIX A

# Opinions of Appellate Division, Second Department

Supreme Court, Appellate Division, Second Department.

· In re Albert Martin Cohen, an Attorney, Respondent.

Denis M. Hurley, Petitioner,

Beldock, Justice.

More than 40 years ago the eminent jurist, Chief Judge Cardozo, declared: "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards ". Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to panish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment" (Matter of Rouss, 221 N. Y. 81, 84-85, 116 N. E. 782, 783).

On the ground that respondent, a member of the Bar since 1922, by his conduct has broken the condition, this proceeding is brought to declare that he has lost the privilege of membership in the Bar.

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The genesis of this proceeding is a judicial inquiry undertaken by direction of this court. Advised by the Brooklyn Bar Association's petition (presented after its own investigation) of serious abuses and unethical practices by attorneys in Kings County with respect to their procurement of negligence cases on a contingent basis and with respect to their prosecution of such cases, this court in the exercise of its inherent and statutory power and duty (N. Y. Const. Art. VI, § 2; Judiciary Law, § 90; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A. L. R. 851), ordered a judicial inquiry. The inquiry was ordered with respect to the alleged illegal, corrupt and unethical practices and with respect to the alleged conduct prejudicial to the administration of justice by attorneys and others acting in concert with them, in Kings County. The purpose, of the inquiry is to expose all the evil practices with a view to enabling this court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them.

The existing conditions in Kings County as a result of the abuses in the handling of negligence cases by attorneys is well portrayed by Chief Judge Cardozo in his summary of the causes leading to the 1928 "ambulance chasing" investigation (People ex rel. Karlin v. Culkin. supra, 248 X. Y. at page 468, 162 N. E. at page 488). Unfortunately, the evils of yesterday have returned to plague us today.

In fairness and in justice to the legal profession, however, we state at the outset that the number of lawyers who appear to be involved in the alleged unethical practices is

minute in relation to the total number of honorable practitioners at the Bar in Kings County.

During the period 1954 to 1958 inclusive, pursuant to the rules of this court, the respondent, who apparently specialized in negligence cases, filed 228 statements as to retainer in his own name and 76 such statements in a firm name, thus indicating that he and his firm had been retained on a contingent basis in a total of 304 negligence cases. He was duly subpoenaed to testify and to produce his records with respect to such cases before the Justice designated by this court to conduct this judicial inquiry at an additional Special Term. On the advice of counsel, respondent invoked his constitutional privilege against self incrimination and refused on that ground to answer/pertinent questions and to produce his records.

It is not disputed that respondent has asserted his constitutional privilege in good faith. Nor is it disputed that the questions put and the records sought come within the scope of the inquiry and that the information sought to be elicited would be relevant. Indeed, these facts are virtually conceded by the parties to this proceeding.

The petition now presented to the court seeks to discipline respondent, not on the ground that he has asserted his constitutional privilege, but on the ground that his refusal to answer relevant questions and his refusal to produce relevant records "are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession", in that such refusals (a) are "contrary to the standards of candor and frenkness that are

required \* \* of a lawyer to the Court', (b) are "in defiance of and flaunt [flout] the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer", (c) have "hindered and impeded the Judicial Inquiry" which had been ordered by this court, and (d) have resulted in respondent's withholding "vital information bearing upon his conduct, character, fitness, integrity, trustand reliability as a member of the legal profession".

Thus, the sole question for our determination is whether the respondent, by reason of his refusal to answer relevant questions and to produce relevant records, may be disciplined as a lawyer, or, stated differently, does his constitutional privilege against self incrimination shield him, not only from possible criminal prosecution, but also from disciplinary action as a member of the Bar for failing in his duties, obligations and responsibilities as a lawyer to the court?

This question goes to the heart of a serious and farreaching problem confronting the Bar, the courts and the public. When this question is finally resolved it will affect the standing at the Bar, not only of this respondent, but of many other lawyers who similarly have asserted their constitutional privilege against self incrimination as a basis for refusing to divulge pertinent information with respect to their practices in relation to negligence cases. The resolution of this question will also determine in large measure whether this court's supervisory and regulatory power over lawyers, and whether this court's plenary power to carb all evil and unethical practices in the profession of the law,

are to be suppressed and subverted, and whether this court is to be rendered impotent in the performance of its inherent and statutory duties relating to attorneys and to the administration of justice.

In order to keep in proper perspective the precise question to be decided here, it should be emphasized that with respect to the members of the Bar collectively, this court has the positive affirmative duty, springing both from its ancient plenary jurisdiction over attorneys and from the express statutory delegation of such power, "to keep the house of the law in order", to compel attorneys "to submit to an inquisition as to professional misconduct". to ascertain the existence of practices which are prejudicial to the administration of justice, to compel the discontinuance of such practices and to discipline those attorneys who may have engaged in them. For the achievement of these ends this court is empowered to make any rule, to hold any inquisition, and to require any attorney to attend and to give evidence under oath. The end and the aim of the inquisition are not punishment, but discipline. And every attorney, as an officer of the court, has the reciprocal duty to aid the court, to co-operate with it, to obey its rules and orders, to respond to all relevant questions put by the court or by the agency conducting the inquiry on its behalf, and to refrain from doing any act which might thwart the inquiry (Judiciary Law, § 90; Gair v. Peck, 6 N. Y. 2d 97, 111, 188 N. Y. S. 2d 491, 501; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470-479, 162 N. E. 487, 489, 492, supra; Queens County Bar Ass'n v. Dwyer, 254 App. Div. 769, 4 N. Y. S. 2d 895; Matter of Cherry, 228 App. Div. 458, 464-465, 240

N. Y. S. 282, 289-290; Matter of Brooklyn Bar Ass'n, 223 App. Div. 149, 151-153, 227 N. Y. S. 666, 669-671; Matter of Bar Ass'n of City of New York, 222 App. Div. 580, 584-587, 227 N. Y. S. 1; Matter of Flannery, 150 App. Div. 369, 371, 135 N. Y. S. 612, 614, affirmed 212 N. Y. 610, 106 N. E. 630).

[3, 4] And with respect to any particular member of the Bar, whenever the occasion demands or whenever his character and fitness are called into question, this court likewise has the positive affirmative duty to re-examine into them and to ascertain whether he still possesses the requisite character and fitness to continue to be a member of the Bar. If it finds that he does not, it must disbar himnot by way of punishment, but "for the protection of both the court and the public \* \* \* from the official ministration of persons unfit to practice." An attorney may continue in the practice of the law only so long as he continues in the possession of the requisite character and fitness (Judiciary Law, § 90; In re Thatcher, C.C., 190 F. 969, 975-977; Matter of Donegan, 265 App. Div. 774, 787-788, 41 N. Y. S. 2d 37, 47, 48; Matter of Rouss, 221 N. Y. 81, 84-85, 116 N. E. 782, supra; In re Durant, 80 Conn. 140, 147, 67 A. . 497).

We disagree with respondent in his contention that the purpose of this proceeding is to discipline him "because he has invoked his constitutional privilege against self-incrimination." Respondent urges, in effect, that his rights as a citizen to be free from punishment for invoking his constitutional privilege are being destroyed if, in his

capacity as a lawyer, he may be disciplined for resorting to such privilege as a citizen. But his argument overlooks the undeniable fact that respondent, with respect to his rights as a citizen and with respect to his obligations as a lawyer, stands in a dual position.

[5, 6] We agree that respondent's rights as a citizen. may not be withheld or impaired in a disciplinary proceeding. No person, layman or lawyer, may be compelled to give testimony against himself if, in good faith, he claims that such testimony may tend to incriminate him, Nor may any person, layman or lawyer, be compelled to sign a waiver of immunity from future criminal prosecution. And no inference of guilt or misconduct may be drawn from the exercise of such a constitutional privilege. In any inquiry. investigation, trial or proceeding the respondent has every right to assert his constitutional privilege in response to any question, whether it deals with his professional acts as a lawyer or otherwise. And he cannot be disbarred for his assertion in good faith of his constitutional privilege. These principles have been well established by our highest courts and we abide by them.

However, we are not dealing here with an attempt to force respondent to testify despite his assertion of his constitutional privilege against self incrimination or his refusal to sign a waiver of immunity. This is not a typical "Fifth Amendment" case." No action is sought to be taken against respondent because of his beliefs, his affiliations with subversive groups, or any specific act of doubtful propriety. The judicial inquiry here deals generally and essen-

tially with the procurement and the prosecution of negligence cases, and the questions put to respondent relate only to his practices with respect to the 304 statements as to retainer filed by him and his firm and with respect to the negligence cases which they embrace.

Hence, there is involved here only the question of whether respondent in his capacity as a lawyer may be absolved from all his duties, responsibilities and obligations to the Bar and to the court to help expose and uproot evil practices and corruption at the Bar and in the courts with respect to negligence cases. If, as it has been often held, disbarment is not criminal punishment, then by asserting his constitutional privilege against self incrimination and thus gaining immunity from criminal prosecution or punishment, is the respondent free to flout and destroy the basic relationship between the lawyer and the court! Can. he, with impunity, disregard the canons of ethics and cast to the winds all inquiries into his professional conduct as a lawyer? Can he disregard his obligation to be frank and candid with the court? Can be negate his duty to co-operate with this court to expose the evil and unethical practices . at the Bar and in the courts! Can he refuse to assist this court in its quest to maintain the integrity and morality of the members of the Bar and to maintain the high standards of the legal profession! We say, emphatically no.

This court already has expressed its opinion upon the basic question here posed, namely, whether the attorney's right as a citizen to assert his constitutional privilege against self incrimination, suspends his duty as an attorney

and officer of the court to aid the court in its judicial inquiry into unethical practices.

In 1940, in Matter of Ellis, 258 App. Div. 558, 565-566, 17 N. Y.S. 2d 800, 807, 808, and in Matter of Grae, 258 App. Div. 576, 17 N. Y. S. 2d 822, a majority of this court, after reviewing the authorities, announced this court's view and future policy with respect to attorneys who assert their constitutional privileges as a ground for refusing to divulge pertinent information upon a judicial inquiry. Such view and policy were stated as follows (258 App. Div. at page 566, 17 N. Y. S. 2d at page 808): "If an attorney is summoned to assist the court by his testimony at its investigation, instituted to uncover unlawful and unethical practices impairing the due administration of justice, and he refuses to answer the court's questions on the ground that his answers would tend to incriminate or degrade him, or unless he is granted immunity, he is guilty of professional misconduct or conduct prejudicial to the administration of justice and will be disbarred."

In adherence to such policy this court suspended Ellis and Grae from the practice of law. But it did so on two separate and distinct grounds, namely: (1) that their assertion of their constitutional privilege against self incrimination does not excuse their refusal to testify and to divulge pertinent information; and (2) that their insistence upon retaining their constitutional privilege of immunity from prosecution and declining to sign a written waiver of such immunity, impeded the investigation and constituted conduct prejudicial to the administration of justice.

Thereafter, in both the Ellis and Grae cases, the Court of Appeals reversed the orders of this Court (Matter of Grae, 282 N. Y. 428, 26 N. E. 2d 963, 127 A. L. R. 1276; Matter of Ellis, 282 N. Y. 435, 26 N. E. 2d 967). Such reversal, however, was based solely on the second ground stated. It was held that the attorneys' refusal to yield their constitutional immunity from criminal prosecution in advance of their testimony and as a condition to permitting them to testify at the judicial inquiry, did not impede the inquiry and is not professional misconduct. This conclusion rested on the express finding of the Court of Appeals that attorneys Grae and Ellis, time and again, had evinced their willingness to co-operate, to testify fully and frankly and to make all their records available if they were not deprived in advance of their constitutional immunity from criminal prosecution by reason of their proffered testimony. The question as to the right of an attorney to refuse to testify in reliance on his constitutional privilege against self incrimination was not reached by the Court of Appeals. Obviously, the consideration of that question became unnecessary because, as stated, both Ellis and Grae were perfectly willing to co-operate with the inquiry and to divulge all relevant information if they had been permitted to retain their constitutional immunity against future criminal prosecution.

Hence, while this court already has taken the nnequivocal position that upon a judicial inquiry an attorney, by the assertion of his constitutional privilege against self incrimination cannot avoid his obligation as a member of the Bar and as an officer of the court to divulge all relevant

information in his possession, the Court of Appeals has not yet definitively passed upon the precise question.

In the light of the respective duties of court and attorney and in the light of recent decisions, we have now re-examined this court's position as expressed in the Grae and Ellis cases, supra, insofar as it relates to the effect of an attorney's associon of his constitutional privilege against self incrimination. After such re-examination we have no hesitancy in affirming such position, limiting it however to the effect of the plea against self incrimination. When so limited, the position of this court is not inconsistent with the position taken by the Court of Appeals in the Grae and Ellis cases, supra, since, as already stated, in those cases the Court of Appeals held only that a waiver of immunity from future criminal prosecution may not be exacted from an attorney as a condition to permitting him to testify in a judicial inquiry.

The highly responsible, and at the same time delicate, position of the lawyer in our society has been well described by Mr. Justice Frankfurter (Schware v. Board of Bar Examiners of New Mexico, 353 U. S. 232, 247, 77 S. Ct. 752, 760, 1 L. Ed. 2d 796):

"Certainly since the time of Edward L through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under

the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' ' in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'"

Mr. Justice Frankfurter also pointed out (353 U. S. at pages 248-249, 77 S. Ct. at page 761) that it is this "moral character" which "has been the historic unquestioned prerequisite of fitness" to be a member of the Bar, and that to "a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts".

It is fair to say, in view of the fiduciary responsibility entrusted to the lawyer, that the corruption or deterioration of his moral character would undermine the administration of justice and thus endanger the security of the State itself. As so aptly said by Chief Justice Charles Evans Hughes, the practice of the profession of the law is " • • the privileged administration of a public trust affording the necessary means by which private and public rights are vindicated, private and public wrongs are redressed, and the very basis of civilization is made secure' (Matter of Williams, D. C., 158 F. Supp. 279, 280).

The courts, and the lawyers as integral functionaries and officers of the court, are the foundation upon which the administration of justice must rest. And, it has been oft repeated, the true administration of justice is the firmest pillar of good government. It is for these reasons, as indicated by the cited cases, that the courts from time immemorial have exercised plenary and summary jurisdiction over attorneys, have required them collectively and individually to conform to the highest standards of rectitude and have swiftly disciplined them for any departure from such standards.

[7] When the position of any person is one of trust and responsibility, one which directly affects the public interest or the security of the State, and one which consequently requires a high degree of moral character and fitness, such person may be removed from his position if he elects to assert his constitutional privilege against self incrimination as a basis for his refusal to answer relevant questions which seek to determine whether he still possesses such character and fitness. So the courts recently have held as to a teacher, a subway conductor and a policeman (Beilan v. Board of Public Education, 357 U. S. 399, 78 S. Ct. 1317, 2 L. Ed. 2d 1414; Lerner v. Casey, 357 U. S. 468, 78 S. Ct. 1311, 2 L. Ed. 1423, affirming 2 N. Y. 2d 355, 161 N. Y. S. 2d 7, affirming 2 A. D. 2d 1, 154 N. Y. S. 2d 461 [2d Dept.]; Matter of Delehanty, 280 App. Div. 542, 115 N. Y. S. 2d 614, affirmed 304 N. Y. 725, 108 N. E. 2d 46; Christal v. Police Commission of San Francisco, 33 Cal. App. 2d 564, 92 P. 2d 416).

It is true that in the four cases last cited there was a special statute which in effect made compulsory the em-

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ployee's maintenance of such character and fitness and which permitted his discharge when the administrative agency by which he was employed determined after a hearing that he lacked the requisite character and fitness or that a reasonable doubt exists whether he does. But the principle on which they were all decided is the same, namely: that while the employee is entitled to refuse to answer any relevant question on the ground that his answer might tend to incriminate him, nevertheless, by reason of his refusal to divulge the relevant information sought, the agency was justified in concluding that he lacked the requisite character and fitness and in removing him from his position. The rationale is, not that he is being punished for invoking his constitutional privilege, but rather that he is being removed from his position because the agency, by reason of his refusal to furnish the information sought, is entitled to conclude that he no longer possesses the requisite character and fitness to continue in the agency's employ.

Of course, no statute is needed to prescribe the high moral character at all times requisite for the lawyer or to define his obligation to the court or his duty to promote the administration of justice and never to impede it. As indicated by the cited cases, such character, obligation and duty are implicit and fundamental; they have been the prerequisites of the office of an attorney and counselor at law from time immemorial, and without them the true administration of justice could not long survive.

[8] But since the high standard of conduct to which the lawyer must conform is incapable of precise definition the begislature has wisely confided to this court a plenary

power and control over all lawyers (Judiciary Law, § 90, subd. 2; Gair v. Peck, 6 N. Y. 2d 97, 188 N. Y. S. 2d 491, supra; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, supra; Matter of Brooklyn Bar Ass'n of City of New York, 223 App. Div. 149, 227 N. Y. S. 666, supra). And, as observed some years ago by the Court of Appeals: "In establishing the standard of conduct to which the bar must, at its peril, conform, the Appellate Division has a wide discretion, with which we have neither the wish nor the power to interfere" (Matter of Flannery, 212 N. Y. 610, 611, 106 N. E. 630, supra).

Respondent relies on several cases (to wit, Matter of Grae, 282 N. Y. 428, 26 N. E. 2d 963, supra; Matter of Ellis, 282 N. Y. 435, 26 N. E. 2d 967, supra, Matter of Kaffenburgh, 188 N. Y. 49, 52-53, 80 N. E. 570, 571; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, supra) as upholding the attorney's right to immunity from disbarment by reason of his assertion of his constitutional privilege against self incrimination. In our opinion, none of them so holds, as will be indicated below. Moreover, as already noted, the real question to be determined here is, not whether the attorney is immune from disbarment by reason of his assertion of his constitutional privilege, but whether the attorney is immune from disbarment by reason of his refusal to co-operate with the court in a judicial inquiry into unethical practices and by reason or his refusal to come forward with an explanation of his conduct when the circumstances require it.

In the Grae and Ellis cases (supra), the Court of Appeals, as previously noted, settled and decided only one

proposition, namely, that an attorney who is willing to testify in a judicial inquiry but who is unwilling, in advance of his testimony and as a condition to permitting him to testify, to sign a waiver of immunity from future criminal prosecution, is not subject to discipline by this court by reason of his refusal to sign such waiver. Indeed, this holding is consistent with our own prior holding (cf. Matter of Solovei, 250 App. Div. 117, 293 N. Y. S. 649, affirmed 276 N. Y. 647, 12 N. E. 2d 802), as well as with our holding in the instant case.

In the Kaffenburgh case, 188 N. Y. 49, 52-53, 80 N. E. 570, 571, supra, the Court of Appeals held only that an attorney could not be disbarred because on the trial of his former employer upon an indictment for conspiracy to defraud, the attorney who had appeared as a witness had invoked his constitutional and statutory privilege against self incrimination and refused to answer relevant questions. That case did not involve the refusal of an attorney to divulge information upon a judicial inquiry, such as the one here.

In the Karlin case 248 N. Y. 465, 162 N. E. 487, 489, supra, during the course of a judicial inquiry such as the one here, the attorney appeared in court but refused to be sworn or to testify as to his conduct in the procurement of retainers. The Court of Appeals, in an opinion by Cardozo, Ch. J., held that he had been properly held in contempt tor his refusal. The only point it decided was that the attorney could not thus defy the inquiry and thwas its purpose by refusing to testify as to what he knows about the evil practices in the profession. Incidentally, the court also indi-

cated that his testimony would be "subject to his claim of privilege if the answer will expose him to punishment for crime". But the only inference to be drawn from this remark is that if he did testify in the judicial inquiry he could claim his privilege against self incrimination without fear of being held again in contempt and without fear of future criminal prosecution. The remark had no relation to the question of whether or not the attorney, if he should assert his constitutional privilege in good faith, could thereafter be disciplined or disbarred as an attorney because of his refusal to divulge relevant information sought in the judicial inquiry. That this is so is made quite plain by the sharp distinction which Chief Judge Cardozo himself drew between a criminal and a disciplinary proceeding. He pointed out that:

"The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law. There are, however, many forms of professional misconduct that do not amount to crimes. Even when they do, disbarment is not punishment within the meaning of the criminal law.

\* \* Inquisition by the court with a view to the discipline of its officers is more than a superfluous duplication of inquisition by the grand jury with a view to punishment of criminals. The two fields of action are diverse and independent". (People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470, 162 N. E. 487, 489 [emphasis supplied].)

This conclusion as to the holding in the Karlin case, supra, also finds ample support in the opinion of the Court of Appeals in a subsequent case (Matter of Levy, 255 N. Y.

223, 225, 174 N. E. 461, 462). In the Levy case, the Appellate Division in the First Department had disbarred an attorney because it found that upon a judicial inquiry, similar to the one here involved, he had pleaded his constitutional privilege in bad faith. The Court of Appeals dismissed the appeal on the ground that the constitutional privilege is not available when it is urged in bad faith and, hence, no question of constitutional construction is properly before the Court of Appeals. It then, apparently, went out of its way, however, to state (255 N. Y. at page 225, 174 N. E. at page 462) that it would "pass as unnecessary for consideration at this time the question whether the assertion in good faith [upon a preliminary judicial inquiry] of the privilege against self-incrimination is ground for disbarment."

It will be noted that the Levy case was decided two years after the Karlin case, that the same judicial inquiry was involved in both cases, that the opinion in the Levy case cites the Karlin case, and that, notwithstanding the Karlin case, the Court of Appeals in the Levy case clearly indicated that the issue here involved is still an open one and would be decided by the Court of Appeals only when it became necessary to do so and when it is properly presented.

It is also significant that the statutes granting a witness immunity from prosecution or from any penalty or forfeiture when he is compelled to answer despite the assertion of his constitutional privilege against self-incrimination, are not deemed to include disbarment. Such immunity statutes do not include disbarment because they are ordinarily "designed to give an immunity as broad as the

constitutional privilege, and no broader", because the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself, and because a proceeding looking to disbarment is not a criminal case or a penalty or forfeiture (Matter of Rouss, 221 N. Y. 81, 86, 116 N. E. 782, 784, supra; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470, 475, 162 N. E. 487, 489, 491, supra; Matter of Solovei, 250 App. Div. 117, 121, 293 N. Y. S. 640, 645, affirmed 276 N. Y. 647, 12 N. E. 2d 802, supra).

[9] In view of (a) the high standard of character and morality required of the attorney as a condition both to his admission and to his retention in the fellowship of the Bar. (b) the close fiduciary relationship between him and the court, (c) his solemn duty to uphold the integrity of the courts and the Bar and to promote the administration of justice, (d) this court's plenary power, and control over him in his capacity as an attorney and counselor at law. (e) the fact that, for good cause shown, this court has initiated a judicial inquiry into unethical practices of attornevs in relation primarily to negligence cases, and (f) the fact that in the course of such inquiry it appeared that the respondent and his firm filed a large number of statements as to retainer (an average of more than 60 a year during the five-year period from 1954 to 1958) for such negligence cases, we say that upon interrogation by the court or its agency there is cast upon him as an officer of the court the affirmative duty to come forward with a full and adequate explanation of every such retainer and to thus re-establish his high moral character.

This conclusion also necessarily flows from the fact that to the extent of respondent's examination before this judicial inquiry, such inquiry inevitably became a preliminary inquiry pro tanto into his personal practices for the purpose of determining whether he had engaged in unethical conduct and for the purpose of determining whether he still possessed the high moral character requisite for a member of the Bar.

- [10] We repeat: every attorney has an absolute right to assert his constitutional privilege against self incrimination as the basis for his refusal to give any explanation of his conduct or his activities, and when he does so he cannot be compelled to testify. But the moment he asserts his constitutional privilege he creates his own dilemma. Thereupon, after opportunity for reflection (which was here given to the respondent), it is for the attorney to choose whether he will rest upon his constitutional privilege or whether he will discharge his duty to co-operate with the court in its judicial inquiry into unethical practices. If, as here, he deliberately elects not to co-operate with the court, then the court has no alternative but to revoke his privilege to continue as a member of the Bar. For his duty to the court is inviolable. He cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical practices, and yet be permitted to retain his privilege of membership in an honorable profession.
- [11] Such membership, it should be emphasized, is a revocable privilege. "There is no vested right in an indi-

vidual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice" (Vinson, Ch.J., In re Isserman, 345 U. S. 286, 289, 73 S. Ct. 676, 677, 97 L. Ed. 1013). We should be ever mindful of the admonition of Mr. Justice Brandeis that "If we desire respect for the law, we must first make the law respectable" (Lief, The Brandeis Guide to the Modern World, p. 166).

[12] To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to cooperate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar.

As Chief Judge Cardozo pointed out in the Karlin case (supra), 248 N. Y. at page 473, 162 N. E. at page 490), the court will make "short shrift" of such a lawyer; it will promptly strike his name from the roll of attorneys and deprive him of his privilege to practice. And, as indicated, such deprivation or such disbarment is not deemed to be punishment, but discipline which the court was always empowered to administer (People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, supra; Judiciary Law, § 90, subd. 2).

Respondent should be disbarred and his name should be ordered to be struck from the roll of attorneys, with leave to apply to vacate the order to be entered hereon upon proof that, within 30 days after the entry thereof, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

Respondent disbarred and his name ordered to be struck from the roll of attorneys, with leave to apply to vacate the order to be entered hereon upon proof that, within 30 days after the entry thereof, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

WENZEL and UGHETTA, JJ., concur.

NoLAN, Presiding Justice (concurring).

If this were a matter of first impression, I would favor a determination in accordance with the views expressed in the dissenting opinion of Presiding Justice Lazansky in Matter of Ellis, 258 App. Div. 558, 567-575, 17 N. Y. S. 2d 800, 809-816. However, the precise question presented here was decided by this court in that proceeding contrary to the views expressed by the Presiding Justice, and that decision was not affected by the reversal in the Court of Appeals of our determination made at the same time that the failure by the respondent in that proceeding to sign a waiver of immunity constituted professional misconduct. Consequently, I concur in the result.

KLEINFELD, Justice (dissenting)

Despite all disclaimers to the contrary, respondent is being disbarred for pleading his privilege against self-incrimination. The Court of Appeals of this State is committed to the view that this cannot be done and in Matter of Grae, 282 N. Y. 428, 434-435, 26 N. E. 2d 963, 966, stated:

"The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution be came a basic principle of American constitutional 'It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.' Matter of Doyle, 257 N. Y. 244, 250, 177 N. E. 489, 491, 87 A. L. R. 418 Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding. Justice Lazansky in Matter of Ellis, 258 App. Div. 558, 572, 17 N. Y. S. 2d 800, 813, expressing the minority view at the Appellate Division: 'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."

In Matter of Kaffenburgh, 188 N. Y. 49, 53, 80 N. E. 570, 571, the Court of Appeals quoted with approval the follow-

ing language from People ex rel. Taylor v. Forbes, 143 N. Y. 219, 228, 38 N. E. 303, 305: "no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained."

If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accusers, cross-examine witnesses, call witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as the court deems proper. Absent such proceeding, the respondent has been denied his rights under the Constitutions of this State and of the United States.

The proceeding should be dismissed.

#### APPENDIX B

# Grant of Stay of Disbarment by Appellate Division

At a Term of the Appellate Division of the Supreme Court of the State of New York. held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1960.

Present-Hon. Gerald Nolan, Presiding Justice,

- PHILIP M. KLEINFELD,
- " MARCUS G. CHRIST,
- " NICHOLAS M. PETTE,
- " ARTHUR D. BRENNAN,

Justices.

In the Matter of ALBERT MARTIN COHEN, an attorney,

Respondent.

DENIS M. HURLEY,

Petitioner.

# ORDER ON MOTION FOR A STAY.

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an order directing that the respondent Albert Martin Cohen (admitted Second Judicial Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the

# Appendix B—Grant of Stay of Disbarment by Appellate Division.

charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and the respondent Albert Martin Cohen having filed an answer, herein, and after due deliberation having been had thereon, this court, by order dated and entered December 31st, 1959, having ordered that by reason of the misconduct established by the evidence the said Albert Martin Cohen be disbarred and removed from the office of attorney and counselor at law and that the name of said Albert Martin Cohen be struck from the roll, of attorneys of the State of New York, etc., and the said respondent, Albert Martin Cohen, having moved for an order staying the operation of the order of disbarment herein pending the respondent's appeal to the Court of Appeals of the State of New York, and for such other and further relief as to the court may seem just and proper, and the said motion having come on to be heard by an order to show cause, dated January 8th, 1960.

Now on reading and filing said order to show cause, the affidavit of David F. Priče, and the answering affidavit of Denis M. Hurley, and the said motion having been argued by Mr. David F. Price of Counsel for respondent, and argued by Mr. Michael Caputo of Counsel for petitioner, and due deliberation having been had thereon:

It is Ordered that the said motion to stay the operation of the order of disbarment entered December 31, 1959, pending appeal to the Court of Appeals, be and the same hereby is granted on condition that respondent be ready to argue or submit the appeal at the next term of the Court of

# Appendix B—Grant of Stay of Disbarment by Appellate Division

Appeals, and this court hereby certifies that a constitutional question is directly involved and, therefore no undertaking is required as a condition to the granting of this stay (cf. Civ. Prac. Act, Sections 598-a, 593).

Enter:

John J. Callahan Clerk.

#### APPENDIX C

### Opinions of Court of Appeals of New York

# STATE OF NEW YORK COURT OF APPEALS

No. 30

In the Matter of

ALBERT MARTIN COHEN, an attorney,

Appellant,

DENIS M. HURLEY.

Respondent.

DESMOND, Ch. J .:

By an order of the Appellate Division, Second Department, one justice dissenting, petitioner admitted to the bar in 1922 has been disbarred from the practice of law. The disbarment order was made after a hearing and on findings that he had refused to answer pertinent questions put to him during a "Judicial Inquiry and Investigation" (Judiciary Law, § 90) ordered by the Appellate Division and held before a Supreme Court Justice assigned by that court, into charges of alleged illegal, corrupt and unethical practices and of alleged conduct prejudicial to the administration of justice, by attorneys and others acting with them, in the County of Kings, where appellant had his law office. Appellant's refusal to answer was on the stated ground that

the answers might tend to incriminate him. On this appeal he argues that the disbarment order was, contrary to law and in violation of his right to due process of law, made solely because of his refusing to answer questions, in good faith reliance on his constitutional privilege (N. Y. Const., art. I, § 6) against self incrimination. The Appellate Division held that he was not disciplined for invoking his constitutional privilege but because, in his capacity and status as a lawyer, he had deliberately breached his inviolable and absolute duty to co-operate with the court in a valid and proper investigation of unethical practices. "A lawyer" wrote the Appellate Division "cannot remain mute, thereby sterilizing, the power of the court and frustrating its inquiry."

There is no dispute as to the facts and no real dispute as to the legality of this kind of general investigation or "Judicial Inquiry" (Judiciary Law, § 90; People ex rel. Karlin v. Culkin, 248 N. Y. 465). On two occasions appellant appeared before the Supreme Court Justice presiding at the Inquiry. He was represented by his own counsel. The counsel for the Inquiry explained the nature of and authority for the Inquiry. Appellant and his attorney were informed by the Inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see Anonymous v. Baker, 360 U. S. 288, 291; People ex rel: Karlin v. Culkin, 248 N. Y. 465, 479, supra), that there were no respondents or defendants, that appel. lant was "not being charged with anything" but was to be questioned as to pertinent facts "within the scope of the Inquiry" and which were thought "to bear on or

relate to your professional conduct", also that counsel for the Inquiry had "information that indicates your participation in professional miscorduct".

Counsel for the Inquiry then put into evidence 228 "Statements of Retainer" which during the years 1954 through 1958 appellant had filed with the Appellate Division in obedience to its Special Rule 3 which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the court and, if he enters into five or more such agreements in any year, must give to the court in . writing certain particulars as to how he came to be retained. Put into evidence, also, when appellant appeared before the Judicial Inquiry were 76 other such Statements. of Retainer filed during the same period by the law firm of Cohen & Rothenberg, with which appellant apparently had some association. Counsel for the Inquiry informed appellant and the court that all these Retainer Statements were offered in evidence "as a basis for some of the questions to follow".

Appellant answered a few preliminary questions as to how long and where he had practised law. About sixty other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel who was present in court, he refused to answer any of them (except questions as to whether he had failed in any case to comply with Special Rule 3 and except as to questions about maintaining a separate office bank account) on the ground that answers might tend

to incriminate or degrade him or expose him to a penalty or forfeiture. Those unanswered questions related to the identity of his law office partners, associates and employees, to his possession of the records of the cases described in his Statements of Retainer, to any destruction of such records, to his bank accounts, to his paying police officers or others for referring claimants to him, to his paying insurance company employees for referring cases to him, and to his promising to pay to any "lay person" 10% of recoveries or settlements. He was asked-and refused to answer-as to whether he had made or agreed to make such payments to any of several named persons, as to whether, he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies and as to whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-A and 270-D of the Penal Law which forbid the solicitation of legal business or the employment by lawyers of such solicitors. At one stage of this questioning counsel for the Inquiry pointedly called to appellant's attention section 90 of the Judiciary Law which gives the Appellate Divisions power and control over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice. At that time the Inquiry's counsel cited Canon 22 of Professional Ethics requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof, Capon 34 outlawing division of fees except with others lawyers; also sections 270-A, 270-B, 270-C, 270-D and 276 of the New York Penai

Law, all relating to soliciting and fee splitting. Counsel for the Inquiry warned appellant and his counsel that "serious consequences" might flow from his refusal to answer by way of a "recommendation to the Appellate Division." Appellant's counsel replied that he was relying on Matter of Grae (282 N. Y. 428) and Matter of Ellis (282 N. Y. 435), as holding that there could not be any "consequences" to lawyers for "doing what they had an absolute legal right to do". Appellant was given a further opportunity to answer but persisted in his refusal, all this being admitted in his pleading in this proceeding.

The Supreme Court Justice presiding at the Judicial Inquiry then filed with the Appellate Division a transcript of the proceedings before him with a recommendation that disciplinary proceedings be instituted against appellant. The Appellate Division directed respondent Hurley, counsel to the Inquiry, to commence this disbarment proceeding. Appellant's answer says that there is only an issue as to whether he was within his rights under article I, section 6, New York State Constitution, in pleading the privilege. The case, however, is not so simple. Of course, he had the right to assert the privilege and to withhold the criminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his in munity (Matter of Ellis, 282 N. Y. 435, supra). But the question still remained as to whether he had broken the "condition" on which depended the "privilege" of membership in the Bar (see Judge Cardozo in Matter of Rouss, 222 N. Y. 81, 84). "Whenever the condition is broken the privilege is lost" (Matter of Rouss.

supra). Appellant as a citizen could not be denied any of the common right of citizens. But he stood before the Inquiry and before the Appellate Division in another quite different caracity, also. As a lawyer he was "an officer of the court, a. I like the court itself, an instrument of justice" (Chief Judge Cardozo in People ex rel Karlin v. Culkin, 248 N. Y. 465, 470, supra), with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to co-operate. Such "co-operation" is a "phrase without reality" as Chief Judge Cardozo wrote in People ex rel. Karlin v. Culkin (supra), if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court. "

The solution to our problem is clear when we consider the lawyer's special position. "The court's control over a lawyer's professional life derives from his relationship to the court" (Theard v. United States, 354 U. S. 278, 281). "Membership in the bar is a privilege burdened with conditions" (Matter of Rouse, 221, N. Y. 81, 84, supra). Those conditions must not be arbitrary but the proper and appropriate ones are numerous. An attorney's contractual right to collect as fees a percentage of settlements or recoveries may validly be limited by court rule (Gair v. Peck, 6 N. Y. 2d 97, certiorari denied 361 U.S. 374). He may be required to represent, without fee, indigent defendants. He cannot solicit retainers or employ others to solicit them for him, or divide his fees with laymen (Penal Law, §§ 270-A, 270-B,

270-C, 270-D, 276). If he know of such practices by others, he must inform the court (Canon 29). He must be candid and frank with the court at all times (Canon 22). Not only must he meet educational requirements and prove his character and fitness before being admitted to the bar but he is subject throughout his professional life to investigation as to whether he continues in the possession of those qualities (Judiciary Law, § 90).

The key word is "duty" and the imposition on a lawyer by tradition and positive law of strict and special duties produces this situation where, at the very time that he is exercising a common privilege of every citizen in refusing to answer incriminating inquiries, he is failing in his duty as a lawyer and endangering his professional life. Breach of the special duty brings a special penalty. Lawyers are not the only citizens whose duty to answer is inconsistent with the exercise of the constitutional privilege. So it is with police officers (Christal v. Commissioners, 33 Cal. App. 2d 564; Canteline, v. McClellan, 282 N. Y. 166) and with certain other public employees (Lerner v. Casey, 2 N. Y. 2d 355, affd. 357 U. S. 468; Beilan v. Board, 357 U. S. 399). The latest in this line of decisions is Nelsong and Globe v. County of Los Angeles (- U. S. -, decided February 29, 1960, 28 Law Week 4159). Nelson and Globe had been ordered by their employer, the County, to answer any questions asked of them by a Congressional subcommittee before which they had been subpoenaed. There was a California statute making it the duty of any public employee so subpoenaed to answer any questions as to his membership in any organization advocating the forceful

overthrow of the United States Government, etc. Nelson's and Globe refused to answer the subcommittee's questions on Fifth Amendment grounds and they were thereupon discharged from their County employment. The United States Supreme Court, following Beilan and Lerner (supra) held that they had been validly separated from their employment not for invoking their constitutional privilege but for insubordination under California law. The majority opinion in the Supreme Court stated that if these men had simply refused without more to answer the subcommittee's questions, the County could certainly have discharged them and the fact that they chose to place their refusal on a Fifth Amendment claim put the matter in no different posture since their assertion of that claim was not used as a basis for drawing an inference of guilt. In those cited cases the duty to co-operate in investigations by answering relevant questions was found in statutes or constitutions. The lawyer's duty is found elsewhere-in the common law and in the Canons of Ethics-but it is just as plainly written. In this State a lawyer on admission to the bar takes the same oath as does a public official (see Judiciary Law, § 466).

The idea that invocation of basic constitutional rights may result, for other reasons, in forfeiture of office or privilege is not a new one. Justice Holmes' aphorism has become famous: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" (McAuliffe v. New Bedford, 155 Mass. 216). The Federal Hatch Act, denying to governmental employees their right of political activity, on pain of dismissal,

has been held valid (United Public Workers v. Mitchell, 330 U. S. 75).

Appellant's reliance is on Matter of Grae (282 N. Y. 647, supra); Matter of Ellis (282 N. Y. 435, supra); Matter of Solovei (276 N. Y. 647) and Matter of Kaffenburgh (188 N. Y. 49). None of those decisions controls us here. The precise question in Grae and Ellis (supra) was as to whether a lawyer who offered to answer all pertinent questions could be compelled in such an investigation to waive immunity in advance of questioning. The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented. Likewise as to Kaffenburgh and Solovei (supra): Kaffenburgh's refusal to testify was at a criminal trial (so in Matter of Cohen, 115 App. Div. 900) and Solovei's was before a grand jury. Our present appellant by declining to answer may have escaped criminal prosecution and punishment, but he could never, while a member of the bar, escape the other consequences of his flagrant breach of his absolute duty to the court whose officer he was. That breach was in itself "professional delinquency" (Ex Parte Garland, 71 U. S. 339, 379) and a valid reason for depriving appellant of his office as attorney.

The order appealed from should be affirmed.

#### COURT OF APPEALS

In the Matter of

ALBERT MARTIN COHEN, an Attorney,

Appellant,

DENIS M. HURLEY,

Respondent.

## Fuld, J. (dissenting):

In order to appreciate the force of today's decision, it must be borne in mind that we are concerned not with the necessarily vague contours of the Due Process Clause of the Federal Constitution, but with the specific provision of the Constitution of this State that no person shall be compelled to be a witness against himself (Art. 1, § 6). Recent Supreme Court decisions (Lerner v. Casey, 357 U. S. 468; Beilan v. Board, 357 U. S. 399; and Nelson & Globe v. County of Los Angeles, decided Feb. 29, 1960,

U. S. ), whatever their bearing on the present problem, are, therefore, not dispositive of this case. In other words, whether or not this disbarment violates federal constitutional guarantees—and for reasons previously expressed (e.g., Matter of Lerner v. Casey, 2 N Y 2d 355, 373, dissenting), I believe that it does—we need not resolve the federal question. The case before us may and should be decided, as were Matter of Grae (282 N. Y. 428) and Matter of Ethic (282 N. Y. 435), on an interpretation of our own Constitution, Article 1, section 6.

I agree that "strict and special duties" have been imposed on a lawyer (Opinion, p. 6). I cannot, however, persuade myself that a lawyer's refusal to answer questions, even before a judicial inquiry, on the constitutionally germissible ground that to do so would incriminate him, may be said to constitute 'a violation of any such duty. (See Matter of Grae, 282 N. Y. 428, supra; Matter of Ellis, 282 N. Y. 435, supra; see, also, People ex rel. Karlin v. Culkin. 248 N. Y. 465, '71.) In the Grae and Ellis cases, the court held that under our State Constitution an attorney's refusal to sign a waiver of immunity-his refusal to forego reliance on the privilege-could not constitute a ground for disharment, even though the refusal occurred during the course a judicial inquiry similar to the one involved here.1 There, too, it was argued that failure to answer was a violation of the lawyer's duty of cooperation with the court. We answered that argument, in a unanimous opinion, in the words of Presiding Justice Lazansky who had dissented in the Appellate Division (282 N. Y., at p. 435):

"The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."

<sup>1.</sup> Indeed, in the Ellis case (282 N. V. 435, supra), the court pointed out that Ellis, "appearing as a witness at the inquiry, not only declined to sign a waiver of immunity \* \* \* but in addition \* \* \* declined to answer any questions upon the ground that such answers would tend to incriminate or degrade him" (p. 437; see, also, 258 App. Div., at p. 559). Although Ellis later wrote a letter stating that, while he stood upon his refusal to sign a waiver, he was "willing," to answer questions put to him, the significant fact is that he never did appear as a witness and that his refusals to answer questions on the ground of self-incrimination went unpunished.

And, therefore, concluded the court (p. 435),

"It follows that " " the present disciplinary proceeding instituted against the appellant, wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable."

The attorneys Grae and Ellis ultimately offered to answer all questions put to them, but, the record makes clear, the offer was based not on a surrender of immunity, but on the specific condition that immunity be granted-by their being compelled to answer questions that might incriminate them. It was for the very reason that the court was unwilling to have immunity conferred on them that it declined to put questions to them without first obtaining a waiver of immunity. Analysis of our opinion, as well as the dissent of Presiding Justice Lazansky (258 App. Div., at pp. 567-575) -which this court explicitly approved (282) N. Y., at p. 434) —demonstrates that the court was not merely passing on the consequences of a momentary lapse of courtesy, but was deciding the very point in issue today. Pointedly noting that "the single offense charged [against Grae] is his refusal to yield a constitutional privilege", the court unequivocally announced that "its exercise cannot be a breach of duty to the court" (282 N. Y., at p. 435).

The attorneys who refused to sign waivers of immunity in those proceedings were not, I am confident, any more cooperative or any more mindful of their "strict and special duties" or of their privileged posts in the affairs of men than the present appellant. And, I venture, the motives which prompted Grae and Ellis to assert their privilege were no different from those of the appellant.

Matter of Grae and Matter of Ellis do not stand alone.

The question now before us first came to this court in 1907 in Matter of Kaffenburgh (188 N. Y. 49). Kaffenburgh was called as a litness on the trial of his employer. for conspiracy to obstruct justice. He was asked questions relating to his possible participation in the conspiracy and declined to answer on constitutional grounds. This was one of the charges on which his disbarment was later sought, and as to it this court wrote (p. 53): "The defendant \* \* \* had the right to refrain from answering any question which might form the basis of or lead to the prosecution of himself or a forfeiture of his office of attorney and counselor at law. . . . We are therefore of the opinion that no offense was stated in the first charge." The court's opinion herein attempts to distinguish Kaffenburgh upon the ground that it involved a trial and not an inquiry into the conduct of lawyers. In point of fact, it was the most serious kind of inquiry into the conduct of lawyers, taking the form of a criminal prosecution. The questions put to Kaffenburgh dealt solely with his conduct in the practice of the law and, certainly, he was as much an officer of the court conducting the trial as the appellant here is of the court conducting the judicial inquiry.

Ten years later came Matter of Rouss (221 N. Y. 81), also cited by the majority. That decision, far from overruling Kaffenburgh on this point, actually confirmed it, for the court explicitly declared that "the charge was made that the refusal to answer was professional misconduct. That charge was not sustained either in the Appellate Division or in this court" (p. 90).

Twenty years after Rouss came Matter of Solovei (276 N.Y. 647, affg. 250 App. Div. 117). As a result of asserted irregularities in connection with a murder investigation in which the respondent therein represented one of the suspects, the Governor appointed an Extraordinary Special and Trial Term of the Supreme Court and a grand jury was drawn for that term. It indicted three persons for murder and, some time later, it also indicted certain other persons, including an office associate of the respondent, for the crime of conspiracy to obstruct justice. The respondent, named as a coconspirator, declined to waive immunity when questioned by the grand jury. That body thereupon presented charges to the Appellate Division. That court dismissed the charges, stating that "Matter of Kaffenburgh . . decided that an attorney who in good faith refused to answer questions on the ground that they might tend to incriminate him was not amenable to disciplinary proceedings" (250 App. Div., at p. 121). The Appellate Division also commented on the nature of the proceedings, noting that, if it was not a breach of duty to the court to refuse to cooperate with it in a public trial, as in Kaffenburgh, it was surely no breach to claim the privilege in a private hearing (p. 120). As indicated, we affirmed without opinion.

Although the court in this case places considerable reliance upon People ex rel. Karlin v. Culkin (Opinion, p. 5), it is noteworthy that the case did not involve a claim of privilege; the attorney simply refused to be sworn or testify. The court spoke of the duty of "co-operation" owed by an attorney in an inquiry such as the present, but it was careful to indicate that such "co-operation" on the part of

Appendix C—Opinions of Court of Appeals of New York the lawyer was "subject to his claim of privilege" (248 N. Y., at p. 471).

It is hardly necessary to say that a scrupulous regard for the constitutional limitation will not leave the disciplina authority powerless or a guilty attorney immune. If, as consel for the judicial inquiry stated toward the conclusion of the investigation, there was information indicating the appellant's "participation in professional misconduct", his unwillingness to furnish information might have justified institution of a disciplinary proceeding founded on such information. And, if such proceeding were to be brought and the appellant were to stand mute therein, he would have to bear all of the legitimate inferences stemming from the damaging evidence adduced against him. It is also relevant that, where immunity is conferred-by overriding the claim of privilege and compelling the witness to answer the questions-and the testimony shows hat he is not fit to continue as a lawyer, he may then be disbarred or otherwise disciplined. (See Matter of Rowss, 221 N. Y. 81, 86 et seq., supra.)

In the present case, however, the appellant's claim of privilege was the sole ground relied upon to disbar him, and this fact cannot be altered or disguised by styling his conduct a "refusal to cooperate with the court". It is to substance that we must look, not to form or labels. The courts should not sanction so easy an avoidance of a constitutional guarantee of a fundamental personal right.

To the charge that it is unthinkable that a lawyer "can retain his status and privileges as an officer of the court" after claiming his privilege (Opinion, p. 5), I would answer

in the words of Mr. Justice Lazansky in his dissent in Matter of Ellis (258 App. Div. 558, 572, supra) —to which I adverted above—that the charge "is based upon false-assumption. Defiance and affront there cannot be when the act has the sanction of the fundamental law of the land". It is, in short, my view that not only Article 1, section 6, of our Constitution but the decisions of this court considering and construing it require us to set aside the order of lisbarment. Failure to do so can only mean that time has croded the importance and vitality of the constitutional privilege against self-incrimination.

I would reverse the order of the Appellate Division.

Order affirmed, without costs. Opinion by Desmond, Ch. J. All concur except Fuld, J., who dissents in an opinion.

#### APPENDIX D

#### Amended Remittitur of Court of Appeals

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-first day of April A. D. 1960.

Present:

Hon. Charles S. Desmond,

Chief Judge, presiding.

Mo: No 275

In the Matter of
ALBERT MARTIN COHEN, an attorney, .

Appellant,

DENIS M. HURLEY,

Respondent.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and lue deliberation having been thereupon had: Appendix D-Amended Remittitur of Court of Appeals

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: "The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in an non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and crossexamination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment." The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated.

AND the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, is hereby requested to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

#### APPENDIX E



#### Order of Disbarment

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 31st day of December, 1959.

#### Present:

Hon. GERALD NOLAN.

Presiding Justice,

- " HENRY G. WENZEL, JR.,
- " GEORGE J. BELDOCK,
- " HENRY L. UGHETTA,
- " PHILIP M. KLEINFELD,

Justices.

In the Matter of

ALBERT MARTIN COHEN, an attorney,

Respondent,

DENIS M. HURLEY,

Petitioner:

#### ORDER OF DISBARMENT

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an

# Appendix E-Order of Disbarment

order directing that the respondent Albert Martin Cohen (admitted Second Judicial Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and respondent Albert Martin Cohen having filed an answer verified July 31st, 1959, and the said proceeding having come on to be heard by an order to show cause, dated July 13, 1959:

Now on reading and filing said order to show cause, the pëtition, the answer, respondent's brief and respondent's reply brief, the exhibits, the testimony of respondent before the Additional Special Term, and all the papers filed herein, and Mr. Denis M. Hurley, petitioner, appearing in person, and Mr. David F. Price appearing for respondent, and due deliberation having been had thereon; and upon the majority opinions of the court herein, heretofore filed:

It is Ordered that by reason of the misconduct established by the evidence, the said Albert Martin Cohen, be and he hereby is disbarred and removed from the office of attorney and counselor at law, and the name of said Albert Martin Cohen ordered struck from the roll of attorneys of the State of New York as of the date of entry of this order, and it is

Further Ordered, pursuant to the appropriate provisions of the Judiciary Law of the State of New York, that the said Albert Martin Cohen is hereby commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and

# Appendix E-Order of Disbarment

is forbidden to appear as attorney and counselor at law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law or its application or any advice in relation thereto, and it is

Further Ordered that the respondent, Albert Martin Cohen, have leave to apply to vacate this order upon proof, that, within 30 days after the entry of this order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

Opinion by Beldock, J. Wenzel and Ughetta, J.J., concur with Beldock, J., Nolan, P.J., concurs in separate opinion; Kleinfeld, J., dissents and votes to dismiss the proceeding, in opinion.

Enter

John J. Callahan Clerk

# TLE COPY

Office Supreme Court, U.S.

F.I.L.E.D

MAY 19.1950

MMES R. BROWNING, Clerk

IN THE.

# Supreme Court of the United States

OCTOBER TERM 1959



IN THE MATTER OF ALBERT MARTIN COHEN, an attorney,

Petitioner,

DENIS M. HURLEY,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENIS M. HURLEY,
Respondent, Attorney Pro Se,
Room 301, Borough Hall Building,
Brooklyn 1, New York.

Telephone: MAin 4-7851

MICHAEL CAPUTO, with him on the brief.

1

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# Supreme Court of the United States

OCTOBER TERM 1959

No. 921

In the Matter of

ALBERT MARTIN COHEN, an attorney,

Petitioner.

DENIS M. HURLEY,

Respondent.

# BRIEF II. OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Albert Martin Cohen, seeks review of an order of the New York State Court of Appeals, dated April 1, 1960, which affirmed an order, dated December 31, 1959, disbarring petitioner from the practice of the law for professional misconduct. The order of disbarment was made by the Appellate Division of the Supreme Court, Second Judicial Department.

Petitioner's applications to stay the operation of the disbarment order were denied on April 27, 1960 by the Appellate Division and on May 4, 1960 by Mr. Justice Harlan.

# Opinions Below

The opinion of the Appellate Division and the concurring and dissenting opinions are reported at 9 A. D. 2d 436. The opinion of the New York State Court of Appeals and the dissenting opinion are reported at 7 N. Y. 2d —

### Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. § 1257 (3).

## Question Presented

Does the disbarment of an attorney by a state court upon the ground that he breached his duty, as an attorney and officer of the court, by refusing to answer candidly questions directly relating to his professional conduct, during the court's general inquiry into unethical practices of attorneys, violate federal due process by reason of the fact that the attorney based his refusal to answer on the ground that his answers might tend to incriminate him?

### Statement

Petitioner was disbarred from the practice of the law for refusing to answer questions relating to his professional conduct put to him during the course of the Appellate Division's Judicial Inquiry into unethical practices of attorneys. Concededly, the questions asked were within the scope of the Inquiry and pertinent to the investigation (R. 24; Petition, App. A, p. 22; 9 A. D. 2d at 438). His refusal to answer was on the stated ground that the answers might tend to incriminate him. The disbarment

<sup>\*</sup> For the same reason, petitioner refused to produce records demanded of him by a subpoena duces tecum (R. 10-1), 17, 52-53).

order of December 31, 1959, provided petitioner with 30 days leave within which to apply to vacate the order upon proof that he "has answered before the Justice presiding at the Judicial Inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum." (Petition, App. E, p. 67). Pursuant to an order of the Appellate Division, dated May 12, 1960, petitioner has the right to apply to the Appellate Division for an extension of this 30 day period.

Since petitioner seeks review upon the theory that the action of the New York courts raises a substantial question as to whether he was deprived of Fourteenth Amendment due process, we refer, at the outset, to the statutory authority tor petitioner's disbarment together with a statement of the proceedings duly had in the courts below.

In New York State, plenary power to admit applicants to the Bar and to discipline attorneys is vested in the appellate division of the supreme court in each of the four Judicial Departments of the State.

Section 90 of the New York State Judiciary Law is entitled:

§ 90. Admission to and removal from practice by appellate division.

Subdivision 2 of Section 90 reads, as follows 2

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional

misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

The statutory procedure to be followed in disciplinary proceedings is prescribed in subdivision 6 of Section 90, as follows:

Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense.

That these statutory procedures governing disciplinary proceedings were strictly complied with in the instant case becomes evident upon analysis of the facts and of the procedures followed by the Appellate Division.

On January 21, 1957 the Appellate Division, acting pursuant to Section 90, subdivision 6, second paragraph, Judiciary Law, in response to a petition of the Brooklyn Bar Association charging "ambulance chasing" and related unethical practices among attorneys in Kings County where petitioner had his office, ordered a preliminary investigation (Judicial Inquiry) into these alleged conditions by

an Additional Special Term of the Supreme Court presided over by a Supreme Court Justice.

On two occasions (six months apart) petitioner appeared as a witness before the Supreme Court Justice presiding at the Inquiry. He was represented by his own counsel (R. 29; 37). The court and counsel for the Inquiry explained the nature of and the authority for the Inquiry (R. 30; 41-43). Petitioner and his attorney were informed by the Inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see Anonymous v. Baker, 360 U. S. 288, 291; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 479), that there were no respondents or defendants (R. 30; 43); that petitioner was "not being charged with anything" but was to be questioned as to pertinent facts "within the scope of the Inquiry", which "bear on or relate to your professional conduct"; also, that counsel for the Inquiry-had "information that indicates your participation in professional misconduct" (R. 43).

Counsel for the Inquiry then put into evidence 228 "Statements of Retainer" which during the years 1954 through 1958 petitioner had filed with the Appellate Division in obedience to its Special Rule 3 which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the court and, if he enters into five or more

<sup>\*</sup>The petition of the Bar Association alleged, among other things: "That such practices result in the following: unfair agreements of retainer; maintenance by lawyers of some system of obtaining prompt information of accidents; congestion of court calendars by unworthy causes which are never intended to be brought to trial; a false conception by lawyers engaged in this practice that the relationship between attorney and client is a commercial transaction in which the interest of the client plays an unimportant part; impairment of public confidence in the Courts; and delay in the administration of justice." (Anonymous v. Baker, 360 U. S. 288, 289, fn. 1.)

writing certain particulars as to how he came to be retained (R. 44-46). (See: Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the Second Judicial Department—Clevenger's Annual Practice of New York, 1959.) Put into evidence, also, when petitioner appeared before the Judicial Inquiry were 76 other such Statements of Retainer filed during the same period by the law firm of Cohen & Rothenberg, with which petitioner had some association (R. 46-47). Counsel for the Inquiry informed petitioner and the court that all these retainer statements were offered in evidence "as a basis for some of the questions to follow" (R. 44).

Letitioner answered a few preliminary questions as to how long and where he had practiced law (R. 29-30; 47-48). About sixty (60) other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel, he refused to answer any of them (except questions as to whether he had failed in any case to comply with Special Rule 3 (R. 58); whether he was familiar with a rule requiring an attorney to maintain records of negligence cases for a stated period of time (R. 56); and whether he maintained a separate office bank account (R. 70)), on the ground that his answers might tend to incriminate or degrade him or expose him to a penalty or forfeiture (R. 31 et seq.).

Those unanswered questions related to the identity of his law office partners, associates and employees (R. 32, 49, 50), to his possession of the records of the cases described in his Statements of Retainer (R. 53), to any destruction of such records (R. 54), to his bank accounts (R. 54), to his paying police officers (R. 59), court or prison employees (R. 60), or others for referring claimants to him (R. 60-61), to his paying insurance-company employees for referring cases to him (R. 61), and to his promising to pay to any "lay person" ten percent of recoveries or settlements (R. 61). He was asked—and refused

to answer—whether he had made or agreed to make such payments to any of several named persons (R. 61-64), whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies (R. 65) and whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-a and 270-d of the New York State Penal Law which forbid the solicitation of legal business or the employment by lawyers of such solicitors (R. 67).

At one stage of this questioning, counsel for the Inquiry pointedly called to petitioner's attention section 90 of the Judiciary Law which gives the appellate divisions power and control over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice (R. 74). At that time the Inquiry's counsel cited Canon 22 of the Canons of Professional Ethics' requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof, Canon 34 outlawing division of fees except with other lawyers; also sections 270-a, 270-b, 270-c, 270-d and 276 of the New York State Penal Law, all relating to soliciting and fee-splitting (R. 74-76).

Counsel for the Inquiry warned petitioner and his counsel that "serious consequences" might flow from his refusal to answer by way of a "recommendation to the Appellate Division" (R. 73-74, 78).

Petitioner's counsel replied that he was relying on Matter of Grae (282 N. Y. 428) and Matter of Ellis (282 N. Y.

<sup>\*</sup>The Canons of Professional Ethics are contained in New York State Judiciary Law (McKinney's Book 29, 1948), Appendix, p. 764. In New York, attorneys have been disciplined for violation of these Canons. Matter of Neuman, 169 App. Div. 638. See also Matter of Annunziato, 201 Misc. 971.

435) as holding that there could not be any "consequences" to lawyers for "doing what they had an absolute legal right to do" (R. 78-79). Petitioner was given a further opportunity by the court to answer but persisted in his refusal (R. 81), all this being admitted in his pleading in this proceeding (R. 84-85).

The Justice presiding at the Judicial Inquiry then filed with the Appellate Division a transcript of the proceedings before him with a recommendation that disciplinary proceedings be instituted against petitioner (R. 22).

The Appellate Division directed the respondent herein, counsel to the Inquiry, to commence disciplinary proceedings against petitioner (R. 22). In accordance with section 90, subd. 6, of the Judiciary Law, respondent instituted disciplinary proceedings against petitioner by service upon him of an order to show cause and a petition containing the charge against petitioner (R. 6-7). Petitioner's answer admitted all the factual allegations in the petition (R. 84). Accordingly, there remained for consideration by the Appellate Division a question of law only which was raised by petitioner in his affirmative defense that "he was within his legal and constitutional rights and noral prerogative in pleading the privilege against selfincrimination . . . under Article 1, Section 6 of the New York State Constitution", and that, under the circumstances "the imposition of any discipline upon " " (petitioner) \* . \* would be a denial to him of due process in violation of his rights under the Constitution of the State of New York and under the Fourteenth Amendment of the Constitution of the United States" (R. 84-85).

After submission of briefs and oral argument, the proceeding before the Appellate Division culminated in its order of disbarment dated December 31, 1959 (R. 3). On appeal to the Court of Appeals, this order was affirmed (April 1, 1960).

#### ARGUMENT

### POINT I

The non-federal grounds upon which the state courts relied are entirely adequate to support the final order of disbarment.

The decisions below are based primarily upon two substantial non-federal grounds: (1) an interpretation of the New York State Constitution, and (2) a construction of the relationship between a New York State court and a New York State lawyer. These non-federal grounds are adequate, in themselves, to support the decisions.

Petitioner in refusing to answer questions invoked the privilege against self-incrimination which was available to him by virtue of a provision of the New York State Constitution (Article 1, Section 6) which reads, in part, as follows:

No person \* \* \* shall be compelled in any criminal case to be a witness against himself \* \* \*.

In a state proceeding, he could not properly plead the privilege as contained in the Fifth Amendment to the federal constitution. (Lerner v. Casey, 357 U. S. 468.) The courts below interpreted the New York constitution to mean that a lawyer may, without adverse consequences, plead the privilege as the basis for refusing to answer questions concerning his professional conduct put to him in the course of a New York State court's investigation into unethical practices of attorneys. They held that petitioner's invocation of his privilege must be sustained. Petitioner could not be compelled to incriminate himself out of his own mouth. What the New York State constitution guaranteed, petitioner was accorded in full measure.

The relationship of a New York State court and a New York State lawyer was construed below to involve a duty upon the lawyer to cooperate with the court in its investigation into unethical practices. Failing this cooperation, the relationship is dissolved by the removal of the attorney from the profession.

The complete adequacy of these non-federal grounds is shown by the following excerpts from the opinions of the courts below.

### (Court of Appeals):

Appellant's answer says that there is only an issue as to whether he was within his rights under article I, section 6, New York State Constitution, in pleading the privilege. The case, however, is not so simple. course, he had the right to assert the privilege and to withhold the criminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his. immunity (Matter of Ellis, 282 N. Y. 435, supra). But the question still remained as to whether he had broken the "condition" on which depended the "privilege" of membership in the Bar (see Judge Cardozo in Matter of Rouss, 222 N. Y. 81, 84). "Whenever the condition is broken the privilege is lost" (Matter of Rouss, supra). Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the Inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was "an officer of the court, and like the court itself, an instrument of justice" (Chief Judge Cardozo in People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470, supra), with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to cooperate. Such "co-operation" is a "phrase without reality" as Chief Judge Cardozo wrote in *People ex rel. Karlin v. Culkin (supra)*, if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court. (Petition, App. C, pp. 51-52.)

### (Appellate Division):

We repeat: every attorney has an absolute right to assert his constitutional privilege against self-incrimination as the basis for his refusal to give any explanation of his conduct or his activities, and when he does so he cannot be compelled to testify. But the moment he asserts his constitutional privilege he creates his own Thereupon, after opportunity for reflection dilemma. (which was here given to the respondent), it is for the attorney to choose whether he will rest upon his constitutional privilege or whether he will discharge his duty to co-operate with the court in its judicial inquiry into unethical practices. If, as here, he deliberately elects not to co-operate with the court, then the court has no alternative but to revoke his privilege to continue as a member of the Bar. For his duty to the court is inviolable. He cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical practices, and yet be permitted to retain his privilege of membership in an honorable profession-(Petition, App. A, p. 39, 9 A. D. 2d at 448).

Thus, the state courts disbarred petitioner upon wholly adequate state grounds.

#### POINT II

Petitioner's claim of deprivation of Fourteenth Amendment due process is insubstantial.

The federal constitutional question raised by petitioner may be restated thus: Is it constitutionally permissible for a supervisory body of a sovereign state to dismiss those whom it supervises on the sole ground that they refuse to answer questions put to them by the supervisory body in an effort to determine the fitness of those being interrogated to continue in their positions?

This question has been answered affirmatively by this court three times in less than two years, the third affirmation being made as recently as February 29, 1960 (Lerner v. Casey, 357 U. S. 461; Beilan v. Board of Education, 357 U. S. 399; Nelson v. County of Los Angeles, 362 U. S. 1).

We are here concerned with the precise problem of whether a state court in the exercise of its control over the conduct of attorneys within its jurisdiction may properly disbar one for refusing to cooperate with the court in its investigation into dishonorable practices. We are thus restricted to an issue, in the words of Mr. Justice Harlan, "intimately associated with the administration of justice in the local courts." And, in this regard the instant proceeding is, in substance, indistinguishable from Gair v. Peck, 6 N. Y. 2d 97; cert. den., 361 U. S. 374. There, as here, the question concerned the permissible limits of the New York State court's control over the conduct of lawyers.

In Gair, this Court refused to review a New York State judgment upholding an appellate division rule regulating the amount of fees which lawyers may properly receive in contingent-fee negligence cases.

<sup>\*</sup> Endorsement, dated May 4, 1960, of Mr. Justice Harlan on decision denying petitioner's application for a stay.

The non-federal question in Gair was the strictly local issue as to whether the rule adopted by a state court, limiting the fees of attorneys, could exist side-by-side with a state statute insuring attorneys freedom of contract with their clients (Judiciary Law, sec. 474). The federal claim of deprivation of liberty and property without Fourteenth Amendment due process was rejected as insubstantial.

In the instant case, the New York courts faced the local problem of whether, while upholding an attorney's invocation of his state constitutional privilege against self-incrimination. (Art. 1, sec. 6) in refusing to answer proper questions in a judicial inquiry the attorney could be disbarred for breach of his inherent duty to the court (Judiciary Law, sec. 90). The New York courts determined that there was no conflict between the state constitution and the state statute; that there was a substantial difference between petitioner's right as a citizen and his obligation in his distinct capacity as an attorney.

In neither case did the Court of Appeals deem petitioner's asserted claims of denial of due process worthy of discussion.

Another similarity must be noted. The rule involved in Gair fixes the fees that lawyers may receive. But the rule also provides that upon proper proof by an attorney that his efforts are worth more than the fee fixed by the rule, the court will increase his fee. Flexibility is present here too. Petitioner was disbarred but with leave to apply to vacate the order of disbarment upon proof that he had performed his duty as a lawyer.

Petitioner relies heavily upon this court's grant of certiorari in Konigsberg v. State Bar of California, 344 P. 2d 777 (Sup. Ct. Calif.) on March 7, 1960. This court also granted certiorari in a similar case on May 2, 1960. In Re Anastaplo, 163 N. E. 2d 429 (Sup. Ct. Ill.). The indication that those cases may present substantial federal constitutional questions is unavailing in the instant proceeding. For, in those cases, applicants for admission to the Bar of California and Illinois, respectively, refused to answer questions concerning their political philosophies on the ground that the questions were improper as violations of the First and Fourteenth Amendments of the United States Constitution. The questions were asked by the respective State Bar Committees charged with the responsibility of passing upon the qualifications of applicants for admission to the Bar. In both instances, the applicants were denied admission upon the sole ground that they refused to answer the questions.

In Konigsberg, the applicant refused to answer any questions put by committee members as to his membership in the Communist party, asserting that such inquiries infringed his rights guaranteed by the First and Fourteenth Amendments (344 P. 2d at 778).

In Anastaplo, the applicant refused to answer inquiries asked by the bar committee as to whether he was a member of the Communist party or any subversive organization (163 N. E. 2d at 430). He refused to answer on the ground that the First and Fourteenth Amendments barred such inquiries (163 N. E. 2d at 439).

In our case, petitioner refused to answer on the ground of possible self-incrimination. Consider too, the nature of the questions that petitioner-attorney refused to answer, inter alia: whether he paid police officers, court or prison employees for referring claimants to him; whether he paid lay persons ten percent of recoveries in negligence cases, and whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies.

Petitioner's right to invoke the privilege against selfincrimination as the ground for refusing to answer these questions was sustained by the courts of New York State.

Comparison between the privilege of freedom of political belief with the privilege against compulsory self-incrimina-

tion is here made only to show that a constitutional question involving the former may be substantial, while one involving the latter may be insubstantial, even though the constitutional questions are raised in cases wherein the facts are similar.

Certainly, this Court's attitude as to the relative importance in our way of life of these two privileges has been made plain. The maintenance of the freedom of political beliefs is a fundamental part of our constitutional system. (Stromberg v. California, 283 U. S. 359, 369). On the other hand, the privilege against compulsory self-incrimination "might be lost, and justice still be done." "Justice, however, would not perish if the accused were subject to respond to orderly inquiry." (Palko v. Connecticut, 302 U. S. 319, 325-326).

In our own case this distinction was stressed by the Appellate Division when it said:

However, we are not dealing here with an attempt to force respondent to testify despite his assertion of his constitutional privilege against self incrimination or his refusal to sign a waiver of immunity. This is not a typical "Fifth Amendment" case. No action is sought to be taken against respondent because of his beliefs, his affiliations with subversive groups, or any specific act of doubtful propriety. The judicial inquiry here deals generally and essentially with the procurement and the prosecution of negligence cases, and the questions put to respondent, relate only to his practices with respect to the 304 statements as to retainer filed by him and his firm and with respect to the negligence cases which they embrace. (Petition, App. A, pp. 26-27, 9 A. D. 2d at 440-441.)

We submit that the federal constitutional question raised by petitioner is insubstantial because (1) the question has been definitively decided adversely to petitioner in three recent cases of this Court; (2) the question arises from a matter which is intimately associated with the administration of justice in the local courts and therefore those courts should make the final determination; (3) the question concerns a disbarment order which is flexible enough to allow petitioner, by his own act, to reenter the profession; and (4) the question involves an inquiry only into petitioner's professional conduct and is in no way concerned with his political beliefs.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Brooklyn, N. Y., May 18, 1960.

Respectfully submitted,

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## Supreme Court of the United States

October Term, 1960

No. 84

In the Matter of ALBERT MARTIN COHEN,

Pititioner.

DENIS M. HURLEY:

Bespondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE.

### BRIEF FOR THE PETITIONER

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# Supreme Court of the United States

October Term, 1960

No. 84

In the Matter of ALBERT MARTIN COHEN,

Petitioner,

DENIS M. HURLEY.

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE.

### BRIEF FOR THE PETITIONER

### Opinions Below

The majority, concurring and dissenting opinions of the Supreme Court of the State of New York, Appellate Division, Second Department (R. 62-79) are reported in 9 App. Div. 2d 436, 195 N. Y. S. 2d 990. The majority and dissenting opinions of the Court of Appeals of the State of New York (R. 81-92) are reported in 7 N. Y. 2d 488, 166 N. E. 2d 672. The Court of Appeals' amended remittitur to the Appellate Division (R. 95, 96) is not reported.

### Jurisdiction

The judgment of the Court of Appeals of New York was entered on April 1, 1960. The petition for a writ of certiorari was filed May 7, 1960, and was granted June 6, 1960. The jurisdiction of this Court rests on 28 U.S. C. Sec. 1257 (3).

### Questions Presented

- 1. May a State, consistent with the due process of law guaranteed by the Fourteenth Amendment, disbar an attorney, absent any evidence of misconduct, unfitness or bad character and solely because he refused, in good faith and on the advice of counsel, to answer questions before a general judicial inquiry in reliance on his privilege against self-incrimingtion?
- 2. May a State, claiming to have undisclosed information of professional misconduct by an attorney, consistent with due process, summon that attorney to a preliminary inquiry, threaten him with that information without disclosing its nature, and on his refusal to testify in reliance on his privilege against self-incrimination, disbar him for that refusal without affording him a full hearing based on the claimed adverse information?

### Constitutional Provision Involved

United States Constitution, Amendment XIV, Section 1, Clause 2:

"... nor shall any State deprive any person of ... liberty, or property without due process of law "

On January 21, 1957, the Appellate Division, Second Department, ordered a general judicial inquiry (hereinafter called the "Inquiry") into solicitation and related practices in the County of Kings, New York (R. 18-20). From March 1957 to June 1958 the Inquiry's staff examined informally about 2,500 persons. See Anonymous v. Baker, 360 U. S. 287, 292. Subsequently, petitioner, in response to subpoenas served upon him, appeared before the inquiry on October 28, 1958, Mr. Justice Arkwright, then presiding, and on May 19, 1959, Mr. Justice Baker, then presiding (R. 22-61).

During the course of his interrogation, petitioner was assured by the Inquiry that he had not been called as a prospective defendant or respondent (R. 32); that the Inquiry was not an adversary proceeding (R. 32); and that he was not being charged with having committed any of the illegal practices with which the Inquiry was concerned (R. 32). However, he was informed by the Inquiry's interrogator that, " . . . we have information that indicates your participation in professional misconduct . . . " (R. 32). The nature of many of the questions asked plainly suggested that statements adverse to petitioner had been made by one or more of the numerous unidentified informants previously interrogated by the Inquiry's staff. Nevertheless, no evidence of petitioner's alleged professional misconduct was ever produced, no further disclosure of. the allegedly adverse information was ever provided, and no source was ever identified. Thus, petitioner had no opportunity to confront or cross-examine his alleged accusers or otherwise avail himself of the protection of the due process clause. Petitioner in this situation, in good faith, heeded his counsel's advice and invoked his constitutional privilege against self-incrimination. He had answered a number of questions and indicated a willingness to answer more, but yielded to his counsel's admonition to refrain from doing so lest he waive his constitutional privilege (R. 43).

It was conceded, as it had to be, that petitioner's assertion of the privilege was neither contumacious nor contemptuous, but was in good faith and within his constitutional rights (R. 54, 64).

On July 9, 1959, respondent, the Inquiry's attorney, petitioned the Appellate Division to discipline petitioner solely for his refusal to waive his privilege against self-incrimination by testifying (R. 5-16). No charges were made on the basis of the allegedly adverse evidence which respondent claimed to possess. If such charges had been made, New York would have required the observance of all of the procedural safeguards encompassed by due process, viz, adequate notice of the specific charges, confrontation and adequate opportunity for cross examination of the theretofore unidentified informants, opportunity to offer evidence in explanation, rebuttal or mitigation, and, finally, respondent would have had to sustain the burden of proving the charges.

In his brief before the Appellate Division, respondent indicated that it was cheaper and quicker to proceed as

<sup>\*</sup> In the course of the Inquiry, petitioner for the same reason refused to produce certain records demanded by a subpoena duces tecum. The issues raised by this refusal have been treated throughout these proceedings as identical to those raised by the refusal to testify.

he did than to incur the "expenditure of time, energy and money" (Respondent's Brief before the Appellate Division, p. 20) that would be necessary to make a case of professional misconduct against petitioner. No hearing was held on the charges of professional misconduct intimated by respondent, and not a scintilla of evidence was introduced to reflect adversely on petitioner's unblemished career at the bar for over thirty-seven years. His distinguished record as a member of the New York State Assembly (1928-1934), his endorsement for the post of Justice of the Domestic Relations Court in New York by the Association of the Bar of the City of New York, the New York County Lawyers Association and the Brooklyn Bar Association and his record of successful practice and good standing at the bar continuously for almost four decades. stands here unassailed and unassailable.\* The sole issue before the Appellate Division was whether the uncontested fact that petitioner had refused to waive his constitutional privilege by testifying warranted disciplinary action.

Petitioner, on July 31, 1959, in his Answer to Respondent's Petition, explicitly asserted that disciplinary action would violate his rights under the due process clause of the Fourteenth Amendment to the United States Constitution (R. 61, 62).

The Appellate Division, Second Department, one justice dissenting, rejected petitioner's contention and held that his privileged refusal to answer in and of itself constituted

Petitioner actually served as a Justice of the Domestic Relations Court for one month in January 1958 as a temporary replacement during the ill health of one of the regular members of that Court.

professional misconduct warranting permanent disbarment (R. 62-79). The order of disbarment was entered on December 31, 1959 (R. 3, 4).

On April 1, 1960, the Court of Appeals, Judge Fuld dissenting, affirmed the disbarment order below (R. 81-95). On April 21, 1960, the Court of Appeals amended its remittitur to the Appellate Division, Second Department, to state (R. 95-100):

"Upon the appeal herein there was presented and necessarily passed upon questions under the Constitution of the United States, giz.: 'The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in a non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and crossexamination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment.' The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated."

### Summary of Argument

I. The right to practice law cannot be taken away arbitrarily. E.g., Konigsberg v. State Bar of California, 353 U. S. 252; Schware v. Board of Bar Examiners, 353 U. S. 232. The State of New York has arbitrarily denied petitioner the right to practice law. It has disbarred him without adducing a scintilla of evidence to impeach his character or fitness to practice law.

The only conduct of petitioner claimed to warrant his disbarment is his refusal in reliance on his privilege against self-incrimination to answer questions put to him by a judicial inquiry into solicitation and related practices. It is obvious and indeed conceded that petitioner was within his constitutional rights in so refusing. 7 N. Y. 2d 488, 495, 166 N. E. 2d 672, 675. See, e.g., Slochower v. Board of Higher Education, 350 U. S. 551; Ullmann v. United States, 350 U. S. 422, 426; Quinn v. United States, 349 U. S. 155, 161.

This is particularly true when, as here, the privilege is invoked in an inquisitorial proceeding, where the witness is unable to summon his own witnesses or cross-examine those against him and where he is evidently under consideration as a potential defendant. In such circumstances, the logical tendency of the assertion of the privilege to prove guilt is "less than negligible". Grunewald v. United States, 353 U. S. 391, 424; Griswold, The Fifth Amendment Today, pp. 21-22. Consequently, it would be arbitrary and capricious and so a denial of due process to infer guilt from petitioner's assertion of his privilege in this case.

Respondent and the Courts below avow that they are making no direct inference from petitioner's assertion of

the privilege. They state that his refusal to testify, considered entirely separate and apart from the privilege, damns him. But the very same context that makes an inference of professional unfitness from petitioner's assertion of his privilege irrational similarly impeaches any attempt to infer unfitness from his refusal to testify. His refusal, concededly privileged, was one that any prudent, innocent man in good faith was fully justified in asserting without incurring the professional death penalty or subjecting him to any disciplinary proceeding.

In Konigsberg v. State Bar of California, supra, this Court squarely held that California could not rationally find Konigsberg lacking in good character merely because he refused to answer certain questions put to him. The probative force of Konigsberg's refusal was held to be so outweighed by Konigsberg's showing of good character that it would be a denial of due process to find him lacking in good character. So here New York could not rationally find petitioner unfit merely because he refused to answer certain questions put to him. Petitioner, unlike Konigsberg, was not obliged to establish his fitness. Under the law of New York, respondent had the burden of proving petitioner's unfitness. Nevertheless, it is a matter of public record that petitioner served with distinction in the New York State Assembly for seven years, was recently endorsed for a local judgeship by three Bar Associations and has never before, in almost forty years at the Bar, had his character questioned. It is plain, then, that here, even more so than in Konigsberg, the record cannot support an inference of bad moral character or unfitness.

But respondent and the Courts below seem to go further. They suggest that petitioner's character and fitness are beside the point: whether he is fit or not, if he refuses to testify in an investigation into attorney practices, he may be disbarred. In other words, refusal to testify, however worthy the refuser may be, ipso facto disqualifies him for the practice of law. This view, too, is so arbitrary as to constitute a denial of due process.

A State can decide that conduct constitutes a per se disqualification for the practice of law only if there is some rational basis for so deciding. But once it is demonstrated at the conduct in question will not support an inference of unfitness to practice, it would seem to follow that there is no rational basis for making it a per se disqualification. Consequently, once it is decided, as it must be here, that petitioner's refusal to testify in good faith and in reliance on his privilege against self-incrimination cannot support an inference of poor moral character or unfitness, it follows that his refusal cannot be made a per se disqualification.

It need only be added that a bolding that New York has acted arbitrarily in disbarring petitioner without evidence of his unfitness to practice would do no noticeable harm to any valid interest of the State, Petitioner's refusal to testify has not left the State impotent to obtain the information it claims to want from him. The Inquiry's activities have been paralleded by a grand jury investigation into solicitation, conspiracy to solicit, and related misconduct by attorneys. This grand jury is empowered to grant immunity sufficiently broad to take the place of the privilege against self-incrimination. In Re Cioffi, 192 N. Y. S. 2nd 754 Kings Co. Ct.), affirmed App. Div. (2d Dept.), N. Y.-L. J., June 28, 1960, p. 1, cols. 1-6, aff'd by Ct. of Appeals, N. Y. L. J., July 12, 1960, p. 6, col. 3. Consequently, the State need only summon petitioner before

this grand jury to learn from him all that it desires to know. Nor has petitioner's refusal to testify left the State powerless to discipline him if, as it claims, it has information of professional misconduct on his part.

II. The right to practice a profession may not be taken away except by a proceeding that comports with all the essentials of procedural due process. E.g., Ex parte Robinson, 19 Wall. 505, 512; Ex parte Garland, 4 Wall. 333, 378; Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123. The essentials include a judicial type hearing at which the party whose rights are being determined is fully apprised of the charges against him and the evidence to support those charges; is permitted to confront and cross-examine witnesses; and is afforded an opportunity to offer evidence in explanation, rebuttal or mitigation.

Instead of affording petitioner these rights with respect to the information of professional misconduct respondent claimed to have, respondent employed a procedural shortcut that effectively deprived petitioner of all of these safeguards. Respondent interposed a preliminary inquiry, threatened petitioner with undisclosed information from unknown sources, and, when petitioner naturally took refuge in his privilege against self-incrimination, utilized that as a basis for disbarment proceedings. The practical effect of this procedure is to disbar petitioner for refusing to meet an undisclosed case without the weapons of confrontation and cross-examination. See Sheiner v. Florida 82 So. 2d 657, 661 (S. Ct. of Fla.). Petitioner's natural caution in the invocation of his basic constitutional rights is made to take the place of an affirmative demonstration of professional misconduct. This is a denial of due process. 4.

III. The right of a private citizen, including lawyers and other licensees, to pursue his calling is afforded greater protection by the due process clause than the right of a public employee to continue on the public payroll. E.g., Ex parte Garland, 4 Wall. 333, 378; Parker v. Lester, 227 F. 2d 708, 717 (9th Cir.). Consequently, the instant case is not controlled by this Court's decisions in cases involving public employees, viz, Lerner v. Casey, 357, U. S. 468; Beilan v. Board of Education, 357 U. S. 399; and Nelson and Globe v. County of Los Angeles, 362 U. S. 1.

### **ARGUMENT**

I.

New York acted arbitrarily and denied due process to petitioner when it disbarred him without any evidence of misconduct, unfitness or bad character, but solely because he refused admittedly in good faith, as was his right, to answer questions before a general judicial inquiry, in reliance on his privilege against self-incrimination.

### The right to practice law cannot be denied arbitrarily.

This Court has held many times that the right to practice law cannot be denied arbitrarily. Konigsberg v. State Bar of California, supra; Schware v. Board of Examiners, supra; Ex parte Robinson, supra; Ex parte Garland, supra. Mr. Justice Black, writing for the Court in Schware, summed the matter up this way (353 U. S. at 238-239):

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. [citations omitted] A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

The State of New York has arbitrarily denied petitioner the right to continue to practice law, his only means of livelihood for over thirty seven years. It has disbarred him without adducing a scintilla of evidence to impeach his character or competence to practice law.

Neither distortion nor legal semantics can obscure the inescapable fact that petitioner's disbarment was based exclusively on his assertion of his constitutional right not to be compelled to testify against himself—an assertion indisputably availed of in the utmost good faith, on the advice of competent counsel and by an attorney whose long standing at the bar has been otherwise unimpeachable. If such drastic consequences automatically follow the invocation of the constitutional right under such circumstances, then that constitutional right becomes nothing more than a snare and a delusion. No argument, no matter how often repeated, nor by what sources, can logically refute the contention that disbarment in such a situation is arbitrary beyond any doubt whatever.

B. Assertion of the privilege against self-incrimination in good faith in any case will not support any inference of any lack of good moral character or of any misconduct or unfitness whatever.

The only conduct of petitioner that can possibly be claimed to warrant his disbarment is his refusal to answer questions put to him by the Inquiry in reliance in good faith and on the advice of counsel, on his privilege against self-incrimination. Can any moral deficiency be inferred from that conduct? This Court has stated again and again that an assertion of the privilege against self-incrimination cannot support an implication of guilt. Mr. Justice Harlan, writing for the Court in Grunewald v. United States, supra, provided a compendium of some of the recent authorities (353 U. S. at 421):

We need not tarry long to reiterate our view that, as the two courts below held, no implication of guilt can be drawn from Halperin's invocation of his Fifth Amendment privilege before the grand jury. Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men, Griswold, the Fifth Amendment Today, 9-30, 53-82. 'Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.' Ullmann v. United States, 350 U.S. 422, 426. See also Slochower'v. Board of Higher Education, 350 U.S. 551, when, at the same Term, this Court said at pp. 557-558: 'The privilege serves to protect the innocent who otherwise might be ensuared by ambiguous circumstances.' "

Any experienced advocate, and certainly the members of this Court, would not fail to appreciate the possibility of such an ensnarement of a reputable attorney in the circumstances disclosed by this record. See, e.g., Quinn v. United States, supra; In Re: The Integration Rule of The Florida Bar, 103 So. 2d 873 (S. Ct. of Fla.); Telford Taylor, Grand Inquests (1955), p. 197.

The basic function of the privilege: "to protect innocent men" seems particularly applicable in the context of the instant case. Petitioner did not assert his privilege in a proceeding avowedly brought against him, with advance notice of the charges, an opportunity to cross-examine adverse witnesses, and all the other procedural safeguards afforded by due process. On the contrary, the subpoena served upon him by the Inquiry did not put him on notice that he would > be called upon to defend himself against charges of professional misconduct. When petitioner appeared, he was explicitly assured that he had not been summoned in the role of a prospective defendant. The line of questioning, however, to which petitioner was subjected belied this disclaimer and petitioner was belatedly informed by the Inquiry's attorney that the Inquiry had information indicating misconduct on his part. Petitioner was thus confronted with unspecified charges of professional misconduct with no opportunity to defend himself in accordance with American concepts of justice. In this context petitioner's able and experienced attorney wisely advised him to invoke his constitutional privilege and refuse to answer, and petitioner followed his advice.

The situation is emphasized by comparison with the Grunewald case where this Court concluded that the weight to be given Halperin's assertion of his privilege against

self-incrimination "was less than negligible" (353 U. S. at 424). The Court was led to this conclusion by circumstances quite like those present here: Halperin was a compelled witness before the grand jury, unable to summon his own witnesses or cross-examine those against him; he was not represented by counsel in the grand jury room; "and most important, ... when Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant" (Id. at 423). And so this Court decided that (Ibid.):

"It was thus quite consistent with innocence for him to refuse to provide evidence which could be used the Government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred."

Dean Griswold, too, spotlights the fallacy of inferring misconduct from the assertion of the privilege before an inquiry like the one conducted below. Thus in *The Fifth Amendment Today* (1955), he states (at pp. 21-22):

"Ordinarily when the privilege of the Fifth Amendment is exercised, it is in a criminal trial. There a specific charge has been made, and the prosecution has by evidence established a prima facie case of guilt of the particular crime charged in the complaint or indictment. Under such circum-

<sup>\*</sup> Petitioner's counsel was permitted to accompany him, but, of course, he had little chance to be useful, since he had no opportunity to question anyone, not even the petitioner.

stances there is much more than the mere claim of the privilege on which to rest an inference of guilt.

"In investigations, however, there are no cearefully formulated charges. Evidence to support such charges has not been introduced and made known to the witness before he is called upon to answer. He has no opportunity for cross-examination of other witnesses, and often little or no opportunity to make explanations which might have a material bearing on the whole situation. In the setting of an investigation, therefore, the basis for the inference from a claim of privilege against self-incrimination is much less than it is when the privilege is exercised in an ordinary criminal trial."

C. Petitioner's invocation of the privilege, under the circumstances of this case, will not support any inference of any lack of good moral character or of any misconduct or unfitness.

Respondent contended and the Courts below held that it is not petitioner's reliance on his privilege that disqualifies him, but his refusal to testify, irrespective of the reason. In other words, the Courts below held that however worthy to practice petitioner may be, the sole fact that he refused to testify before the Inquiry proved him to be unworthy. That conclusion is wholly arbitrary, as Schware and Konigsberg demonstrate.

In Schware, this Court unanimously held that the New Mexico Supreme Court had denied Schware due process of law by unreasonably finding that he had failed to show good moral character. It was this Court's view that in the light of Schware's "forceful showing of good moral character" (353 U. S. at 246), the New Mexico Court could not rationally infer bad character from Schware's earlier his-

tory of arrests, use of aliases and seven years in the Communist Party; that the New Mexico Court had erred by unduly emphasizing these events to the neglect of the real question before it—was Schware of good moral character? And that the record in Schware permitted only one answer to that question.

Similarly, in Konigsberg, this Court held that the California authorities could not, in the light of the evidence of Konigsberg's good character, infer poor moral character or doubtful loyalty from Konigsberg's refusal to answer certain questions about his political associations and beliefs.

The New York Court has inadvertently failed to heed the lesson of Schware and Konigsberg. It has given disproportionate weight to petitioner's refusal to testify and has ignored his otherwise unchallenged good character and fitness to practice. Standing out in bold relief is the fact that petitioner, unlike Schware and Konigsberg, did not have the burden of producing evidence on the issue of his character and fitness. See, e.g., Matter of Fisch, 231 App. Div. 192; 246 N. Y. S. 760 (1st Dept.); Matter of Cook, 242 App. Div. 224, 273 N. Y. S. 13 (1st Dept.); Matter of Farrell, 237 App. Div. 678, 262 N. Y. S. 766 (1st Dept.).

<sup>\*</sup> These authorities would seem to make it unnecessary for this Court to decide here whether due process requires the State to carry the burden of proof in a proceeding to disbar. However, if the Court should deem the question material, its decisions on related questions indicate that the State would be denying due process if it imposed upon an attorney the burden of proving that he had not engaged in misconduct sufficiently serious to warrant his disbarment. See, e.g., Speiser v., Randall, 357 U. S. 513; Tot v. United States, 319 U. S. 463.

Petitioner is not an applicant for admission to the Bar. Unlike an applicant, he has already persuaded the appropriate authorities of his competence and character; and, if he is in fact unfit, surely respondent should have been able to find some evidence of that unfitness somewhere in petitioner's thirty-seven years at the Bar. Not only has respondent failed to come forward with such evidence, but it is a matter of public record that petitioner served with distinction in the New York State Assembly for seven years, that just three years ago he was endorsed for the post of Justice of the Domestic Relations Court in New York by three outstanding New York City Bar Associations, and that his character has never before been questioned.

The conclusion of the Court of Appeals for the District of Columbia Circuit in *In Re Carter*, 177 F. 2d 75, 78, cert. denied, 338 U. S. 900, seems apt:

"An applicant for admission to the bar must satisfy the authorities as to his moral character, and custom has established confidential inquiry as an element of that procedure. But when he has been admitted, his removal from practice is a disbarment, about which elaborate procedural requirements are thrown. Such removal after admission is not a meredenial of an application for admission. The same is true in respect of licenses to do business in many forms. Prior to grant, many processes are available for inquiry and information. But once granted, the license becomes a right, and due process of law must be followed to achieve deprivation."

Petitioner's refusal to testify, considered without reference to any claim of privilege, does not even tend to impugn

his character and fitness. It is conceded that his refusal was not contemptuous or contumacious. Given the inquisitorial nature of the proceedings and respondent's threats, both implied and expressed, petitioner was "quite evidently already considered a potential defendant" to use again the language of the *Grunewald* case (supra); his refusal was no more than a simple act of self-protection, and a concededly privileged one at that.

The reductio ad absurdum that Mr. Stanley At Weigel suggests in his The Fifth Amendment and the Lawyer's Responsibility, is strikingly apposite, 34 Neb. L. Rev. 586, 589 (1955):

"The lawyer before us is a member of the bar in good standing. He has been so for many years. His professional activity has been without blemish. His citizenship has been flawless. He is an innocent man, a reputable lawyer and a good citizen.

"Nothing intervening, he now exercises a right guaranteed him by the Constitution of the United States (which he has sworn to uphold).

"Presto! This self-same man has now forfeited his right to practice his profession, losing all standing as a lawyer. His innocence is now questionable. His good citizenship is now suspect."

Finally, could there be any remaining doubt that petitioner's refusal to testify casts no adverse reflection on his character or fitness, it should be noted that petitioner was advised by counsel and believed that since he had a right to refuse to testify in reliance, on his privilege against self-

<sup>\*</sup> See, 7 N. Y. 2d 488, 495, 166 N. E. 2d 672, at 675, where the Court below concedes petitioner's right to invoke the privilege.

incrimination, he could not possibly be breaching any duty by so doing. Indeed, petitioner was abundantly warranted in believing that the highest Court in his State had repeatedly held that an attorney does no wrong by refusing to testify in reliance on his privilege against self-incrimination. See the Court's opinion below (7 N. Y. 2d at 494, 166 N. E. 2d at 675). Matter of Grae, 282 N. Y. 428, 26 N. E. 2d 963; Matter of Ellis, 282 N. Y. 435, 26 N. E. 2d 967; and see also, Matter of Kaffenburgh, 188 N. Y. 49, 80 N. E. 570; Matter of Solovei, 276 N. Y. 647, 12 N. E. 2d 802, aff'g without opinion 250 App. Div. 117, 293 N. Y. S. 640 (2nd Dept.). Petitioner's view of the New York authorities is shared and approved by the highest Courts of Florida and Illinois, by eminent scholars, and indeed, it would appear, by this Court. See Konigsberg v. State Bar of California, 353 U.S. 252, 270 and note 31; Sheiner v. Florida, 82 So. 2d 657, 661-662; In re Holland, 377 Ill. 346, 36 N. E. 2d 543, 547; Walter Gellhorn, Individual Freedom and Governmental Restraints (1957), p. 139; Telford Taylor, Grand Inquest (1955), p. 211; and see Judge Fuld's dissenting opinion below. Even the New York Court of Appeals recognized that there seemed to be but a slight difference between its holdings in the prior cases and the present case, for in its opinion below it said this of its earlier decisions (7 N. Y. 2d at 497, 166 N. E. 2d at 677):

"The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented."

On the record in this case, Mr. Justice Frankfurter's conclusion in his concurring opinion in Schware seems applicable. He said (353 U. S. at 251):

"To hold, as the court did, that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner 'a person of questionable character' is so dogmatic an inference as to be wholly unwarranted."

So it is here: to hold that petitioner's reliance on his privilege against self-incrimination in and of itself impeached his moral character and proved him unfit to practice law this so dogmatic an inference as to be wholly unwarranted".

# D. No State can constitutionally make a refusal to testify a per se disqualification to practice law.

In Konigsberg v. State Bar of California, 52 Cal. 2d 769, 344 P. 2d 777 (1959), in which case this Court very recently granted certiorari, 362 U. S. 910, the Supreme Court of California had held that even though Konigsberg's moral character could not be questioned on the record presented, his refusal to testify ipso facto disqualified him from admission to the Bar. Respondent presumably will adopt that view and maintain that petitioner's refusal to testify, ipso facto, regardless of all else, disqualifies him from continuing to practice his lifelong profession.

This view has been held by this court in its opinion in the first Königsberg case, 353 U.S. 252, to be so arbitrary as to constitute a denial of due process when applied to applicants for admission to the Bar. Unquestionably is it so when applied to one who has already been admitted.

Once it is demonstrated that the conduct in question will not support an inference of unfitness to practice, it would seem to follow that there is no rational basis for a State making it a per se disqualification. Consider, for example, this Court's decision that Schware's prior arrests, use of aliases and membership in the Communist Party could not support an inference of the lack of the requisite good character. Similarly, once it is decided, as it must be here, that petitioner's refusal to testify in reliance on his privilege against self-incrimination cannot support an inference of lack of good character or of unfitness, it follows that there is no rational basis for making it a per se disqualification.

The arbitrariness of a rule that would make a refusal to testify before an inquiry into attorney practices an ipso. facto disqualification to practice law becomes still more apparent if one considers some other situations to which such a rule would presumably apply. Suppose, for example, that the Inquiry summoned before it an attorney who was counsel to several of the lawyers being investigated by the Inquiry. If this attorney were asked to reveal all that his clients had told him and he refused; reminding the Inquiry of his duty to preserve the confidences of his clients, the theory advanced by respondent and the Courts below would seem to require his disbarment. Or suppose that an Arkansas Court were to undertake an inquiry into champerty and maintenance, with particular reference to whether the N.A.A.C.P. was guilty of those offenses, and an attorney . were asked to provide the names of many of the Association's members so that they might be summoned as witnesses. If he refused, the theory advanced by respondent and the Courts below would seem to require his disbarment. And yet Bates v. City of Little Rock, 361 U. S. 516, 80 S. Ct.

412, almost certainly requires the conclusion that disbarment under those circumstances would be a denial of due process. To cite just one more example, suppose that a Federal Court were investigating professional misconduct by several individual attorneys on the staff of the Justice Department and a United States attorney were subpoenaed to produce certain relevant Department papers in his custody. This Court has held that he may refuse to comply with that subpoena if a Department regulation sc requires. United States ex rel. Touhy v. Ragan, 340 U. S. 462. And yet the theory advanced by respondent and the Courts below would seem to require his disbarment.

In these hypothetical situations, and they could be extended indefinitely, the recalcitrant attorney seems to have failed in what the Court below has called the duty to "be candid and frank with the court at all times (Canon 22)". (7 N. Y. 2d at 496, 166 N. E. 2d at 676.) In none of them, it is submitted, could disbarment withstand an attack on due process grounds. And the reason is simple: the context of each refusal must be examined, and when it is examined, it appears that none of the refusals reflects adversely on the refuser's fitness to practice law. And so it is with the context in which petitioner refused to testify.

Surely, if an attorney's refusal to testify cannot subject him to disciplinary action when he bases that refusal on the statutory attorney-client privilege or on Justice Department regulations, the valid assertion of a constitutional privilege as a basis for refusal cannot produce a different result. To hold otherwise could only mean that the privilege against self-incrimination has in fact become the admission of guilt that the uninformed take it to be. But this Court, time and time again, has vigorously opposed that concep-

tion of the privilege. Mr. Justice Frankfurter stated in *Ullmann* v. *United States*, that the privilege against self-incrimination (350 U. S. at 426-427):

". . . registers an important advance in the development of our liberty-'one of the great landmarks in man's struggle to make himself civilized.' [Griswold, The Fifth Amendment Today (1955), p. 7] Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bills of Rights as a condition to acceptance of the Constitution by the ratifying States . . ."

See similar statements in, e.g., Slochower v. Board of Education, 350 U. S. at 557; Grunewald v. United States, 353 U. S. at 421; Quinn v. United States, 349 U. S. at 161. Relying in part on these authorities, the Supreme Court of Florida recently rejected efforts to amend the rules dealing with the practice of law in Florida to permit disbarment for invoking the privilege against self-incrimination. It held that since the innocent may invoke this privilege, "its exercise may not be considered a breach of duty to the court". In Re: The Integration Rule of Florida Bar, 103 S. 2d at 875.

It need only be added that a holding that New York has acted arbitrarily in disbarring petitioner without evidence of his unfitness to practice would do no noticeable harm to any valid interest of the State. Petitioner's refusal to testify has not left the State impotent to obtain the information it claims to want from him. (The phrase "claims to want" is used advisedly, for respondent has implied that he already has this information from other sources.) The Inquiry's activities have been paralleled by a grand jury investigation into solicitation, conspiracy to solicit, and related misconduct by attorneys. The New York Courts have recently held that this same grand jury is empowered to grant immunity sufficiently broad to take the place of a witness' privilege agairst self-incrimination. In re Cioffi, supra. Consequently, the State need only summon petitioner before this grand jury to learn from him all that it desires to know.

Nor has petitioner's refusal to testify left the State powerless to discipline him if, as it claims, it has information of professional misconduct on his part.

Judge Fuld highlighted these points well in his dissent below, and they are incontrovertible. He said:

"It is hardly necessary to say that a scrupulous regard for the constitutional limitation will not leave the disciplinary authority powerless or a guilty attorney immune. If, as counsel for the judicial inquiry stated toward the conclusion of the investigation, there was information indicating the appellant's 'participation in professional misconduct,' his unwillingness to furnish information might have justified institution of a disciplinary proceeding founded on such information. And, if such proceeding were to be brought and the appellant were to stand mute therein, he would have to bear all of the legitimate inferences stemming from the damaging evidence adduced against him. It is also relevant

that, where immunity is conferred—by overriding the claim of privilege and compelling the witness to answer the questions—and the testimony shows that he is not fit to continue as a lawyer, he may then be disbarred or otherwise disciplined. (See Matter of Rouss, 221 N. Y. 81, 86 et seq., supra.)"

### II.

By summoning petitioner to a preliminary inquiry, threatening him with undisclosed information of professional misconduct and when he refused to testify in reliance on his privilege against self-incrimination, disbarring him solely for that refusal instead of affording him a full hearing based on the claimed adverse information, the State denied petitioner due process of law.

It has long been established that the right to practice a profession or to pursue a particular line of private employment is entitled to constitutional protection and may not betaken away except by a proceeding that comports with all the essentials of procedural due process. E.g., Ex parte Robinson, 19 Wall. 505, 512; Ex parte Garland, 4 Wall. 333, 378; Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123; Sheiner v. Florida, 82 So. 2d 657, 661 (S. Ct. Fla.); In Re: Burke, 351 P. 2d 169, 172 (S. Ct. of Ariz.); Parker v. Lester, 227 F. 2d 708, 717 (9th Cir); Matter of Los Angeles County Pioneer Society, 217 F. 2d 190 (9th Cir.); In Re: Carter, 177 F. 2d 75, 78 (D. C. Cir.) cert. denied 338 U. S. 900; In Re: Carter, 192 F. 2d 15, 17 (D. C. Cir.) cert. denied 342 U. S. 862; Laughlin v. Wheat, 95 F. 2d 101 (D. C. Cir.); United States v. Hicks, 37 F. 2d 289 (9th Cir.); cf. Konigs-

berg v. State Bar of California, supra; Schware v. Board of Bar Examiners, supra.

In Ex parte Robinson, supra, this Court said (19 Wall. at 512):

"Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court, and, as said in Ex parte Garland, 'they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.' Before judgment disbarring a lawyer is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property . . . The principle that there must be citation before hearing, and hearing or opportunity to be heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

More recently in Goldsmith v. Board of Tax Appeals, supra, this Court similarly stated (270 U. S. at 123):

"The rules adopted by the Board provide that the Board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process."

The foregoing cases make it clear that the mandate of due process requires a judicial type hearing at which the party whose rights are being determined is fully apprised of the charges against him and the evidence to support those charges; is permitted to confront and cross-examine witnesses; and is afforded an opportunity to offer evidence in explanation, rebuttal or mitigation. Consequently, if, in the absence of the judicial inquiry, respondent had sought to have petitioner disbarred, the respondent would have been obliged to make specific charges of professional misconduct, to present evidence in support of those charges, to permit petitioner to cross-examine witnesses and present evidence of his own, and, finally, respondent would have had to sustain the burden of proving the charges.

Instead respondent employed a procedural short-cut that effectively deprived petitioner of all of these safeguards. Respondent interposed a preliminary inquiry that was plainly intended to present petitioner with a Hobson's choice. Without providing petitioner with any specific charges, indeed without warning him at all that he would be called upon to defend himself and after informing peti-

<sup>•</sup> Presumably this much will be conceded by respondent, for the New York authorities accord with the cited decisions from other Courts in securing the rights listed to an attorney in a disbarment proceeding. N. Y. Judiciary Law, Sec. 90(6); Matter of Eldridge, 82 N. Y. 161, 166-167; Matter of Kaufmann, 245 N. Y. 423, 157 N. E. 730, 734; Matter of Joseph, 125 App. Div. 544, 109 N. Y. S. 1018 (1st Dept.); Matter of Lynch, 227 App. Div. 477, 238 N. Y. S. 482 (1st Dept.); Matter of Fisch, 231 App. Div. 192, 246 N. Y. S. 760 (1st Dept.).

tioner that he had not been summoned in the role of a prospective defendant, respondent proceeded to question petitioner in a way that clearly belied this disclaimer. All too late, respondent went so far as to inform petitioner that the Inquiry had information indicating professional misconduct on his part. No such information was presented and petitioner was left in the dark as to the source of the information, its nature, and whether any steps had been taken to test its credibility. Petitioner was thus given the option of meeting an undisclosed case against him or of following the dictates of prudence and asserting his privilege against self-incrimination, When he naturally followed the advice of his attorney to take the latter course, respondent and the lower courts seized upon this as a substitute for an affirmative demonstration that petitioner had been guilty of professional misconduct and instituted disbarment proceedings.

It is submitted that this proceeding constitutes an attempt to subvert and destroy petitioner's constitutional right to an adversary-type hearing and is a clear denial of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States. To be sure, petitioner could have had a hearing here, but, because of respondent's tactics, it would have been a worthless one. It would have dealt solely with the uncontested question of whether petitioner refused to testify in reliance on his privilege against self-incrimination. It would not have begun with presentation of the specific charges of misconduct alluded to by respondent at the Judicial Inquiry. It would not have continued with the presentation of evidence to support those charges. It would not have given petitioner the opportunity to rebut those charges with all the weapons that procedural due process affords.

The practical effect of the procedure followed was to disbar petitioner on the basis of undisclosed information provided by unseen informers, a procedure most recently held a denial of due process in In Re: Burke, 351 P. 2nd 169 (S. Ct. of Ariz.). In Sheiner v. Florida, supra, the Supreme Court of Florida recognized that there is no difference between the procedure employed below and condemnation without trial. Reversing a judgment of disbarment based solely upon an attorney's refusal to answer questions on the ground that the answers might tend to incriminate him, the Court said (82 So. 2d at 661):

"The last cited case [Matter of Murchison, 349 U. S. 133] and the Peters Case [Peters v. Hobby, 349 U. S. 331] are pertinent here for the emphasis they place on confrontation, cross-examination and fair trial as ingredients of due process. Confrontation and cross-examination under oath are essential to due process because it is the means recognized by which we test the probity of the evidence and eliminate that which is trumped up or of doubtful veracity. The 'faceless informer' theory of proof should never be substituted for confrontation and cross-examination in a trial where the end result is to deprive the accused of one of his most precious assets—the privilege to practice law."

Mr. Justice Kleinfeld stated in his dissenting opinion below 9 A. D. 2d at 449, 195 N. Y. S. 2d at 1004:

"If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accusers, cross-examine witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as



the court deems proper. Absent such proceeding, the respondent has been denied his rights under the Constitutions of this State and of the United States."

If the judgment below is permitted to stand, it will serve as a model for those who would evade constitutional safeguards which this Court has been at great pains to preserve. The new procedure will be simple: summon the person whose license to practice law is sought to be revoked; make vague threats about possessing adverse information so that the target will be moved to assert his privilege against selfincrimination; then revoke the license because the licensee has failed to cooperate with the investigation. In this way the inconvenience of presenting a case against the intended victim can safely be avoided. That this is not an overdrawn picture of what occurred below is best indicated by respondent's statement in his brief (p. 20) before the Appellate Division that it was cheaper and quicker to proceed in this manner than to incur the "expenditure of time, energy and money" that would be necessary to make a case of professional misconduct against petitioner.

It should not be assumed that only attorneys are vulnerable to the kind of constitutional avoidance attempted by respondent. Hosts of Americans, like attorneys, need licenses from the State in order to earn their livings. These people too, are entitled to procedural due process before the State may deprive them of their livelihoods. E.g., Parker v. Lester, 227 F. 2d 708 (9th Cir.) (merchant seaman); In Re: Carter, 177 F. 2d 75 (D. C. Cir.) cert. denied 338 U. S. 900 (bail bondsman); Hecht v. Monaghan, 307 N. Y. 461, 121 N. E. 2d 421 (taxi driver); Alpert v. Board of Governors of City Hospital, 286 App. Div. 542, 145

N. Y. S. 2d 534 (4th Dept.). (physician); Miami v. South Miami Coach Lines, Inc., 59 So. 2d 52 (S. Ct. of Fla.) (bus line); Parker v. Board of Barber Examiners, 84 So. 2d 80 (La. Ct. App.) (barber college).

If the decision below is upheld, there would seem to be nothing to prevent the States from making all licensees second-class citizens whose cardinal right to earn a livelihood can be terminated in accordance with procedures that evade due process requirements. The number of people that would be included in that category is enormous. Some idea of the potential impact of the principle contended for by respondent can be gathered from Professor Gellhorn's summary of the vast range of governmental licensing activity in his Individual Freedom and Governmental Restraints, at p. 106:

"By 1952 more than 80 separate occupations, exclusive of 'owner-businesses' like restaurants and taxicab companies, had been licensed by state law; and in addition to the state laws there are municipal ordinances in abundance, not to mention the federal statutes that require the licensing of such diverse occupations as radio operators and stockyard commission agents. As long ago as 1938 a single state, North Carolina, had extended its laws to 60 occupations. One may not be surprised to learn that pharmacists, accountants, and dentists have been reached by state laws, as have sanitarians and psychologists. assayers and architects, veterinarians and librarians. But with what joy of discovery does one learn about the licensing of threshing machine operators and dealers in scrap tobacco! What of egg graders and guide-dog trainers, pest controllers and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers? And what of the pypertrichologists

who are licensed in Connecticut, where they remove excessive and unsightly hairs with the solemnity appropriate to their high-sounding title?"

It would be highly ironical if the first group of licensees to be deprived of procedural due process were the lawyers. Not only are they the sworn defenders of due process, but they are the group society most needs protected from arbitrary reprisals. History is replete with the names of intrepid attorneys who have championed causes which at the time were unpopular in order to perpetuate the cause of freedom and democracy. As this Court stated in Konigsberg v. State Bar of California, 353 U.S. at p. 273:

". . . A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers are unintimidated—free to think, speak and act as members of an Independent Bar."

And we do not hesitate to add, free to exercise their constitutional rights. Nor does an attorney make enemies only by taking an unpopular political position. As the New York Court of Appeals observed in *Matter of Eldridge*, 82 N. Y. 161, 166-167, 37 Am. Rep. 558:

"His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous. His duties are delicate and responsible, and easily subject to misconstruction. . . ."

It is a delusion to think that the public welfare is advanced by the sacrifice of an attorney's basic liberties. The exigencies of the moment cannot justify resort to pro-

cedures which are foreign to our Anglo-American traditions of fair play or which deny basic constitutional rights. As Mr. Justice Cardozo (then Chief Judge of the Court of Appeals of New York) said in Matter of Doyle, 257 N. Y. 244, 268, 177 N. E. 489, 498:

"Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.' (Holmes, J. in Northern Securities Co. v. United States, 193 U. S. 197, 400)."

#### III.

The questions presented have not been resolved by this Court's decisions in cases involving public employees, as the right of a private citizen to pursue his calling must be afforded greater protection than the right of a public employee to continue on the public payroll, if the due process clause is not to be judicially exterminated.

The Court below relied in part upon this Court's decisions in Lerner v. Casey, 357 U. S. 468; Beilan v. Board of Education, 357 U. S. 399; and Nelson and Globe v. County of Los Angeles, 362 U. S. 1, decided February 29, 1960. The import of these cases, all decided by a sharply divided Court, is, that a State may constitutionally discharge a public employee, paid by public funds, for refusing to answer questions relevant to his employment even though the refusal is based upon his privilege against self-incrimination.

The reliance by the Courts below upon such cases involving public employees ignores the settled distinction between the rights of private citizens and those of public employees.

The authorities have always proceeded on the principle that the Government as an employer must possess many of the powers with respect to its employees that a private employer has. Indeed, at one time it was widely believed that the due process clause afforded the governmental employee no protection whatever insofar as his job was concerned. See, Bailey v. Richardson, 182 F. 2d 46, 57 (D. C. Cir.), aff'd by equally divided Court, 341 U.S. 918. Although this approach to the rights of governmental employees has been modified considerably in recent years (See, e.g., Wiemann. v. Updegraff, 344 U.S. 183), it is still true that the Government, in its role as employer, can demand many things . from its employees that it cannot demand from private citizens merely because they hold a license from the State. No libertarian outcry is prompted by denial of the right to strike to Government employees. But could a State constitutionally deny the right to strike to, say, barbers and taxi drivers without providing some compensatory substitute for that right? It is also true that a State may constitutionally discharge an employee for taking an active part inpolitical activities. United Public Workers v. Mitchell, 350 U. S. 75. Does this mean that it can constitutionally disbar attorneys for engaging in political activities? Indeed, there would seem to be nothing in the Constitution requiring a State to maintain a civil service system in preference to a spoils system. And yet a State would surely be denying due process if it disbarred all attorneys who happened to support the wrong political party.

Many cases have explicitly recognized the difference between public employees and private citizens. For example, in Ex parte Garland, 4 Wall. at 378, this Court said:

> "The profession of an attorney and counselor is not like an office created by an Act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution."

In Parker v. Lester, supra, the Court of Appeals for the Ninth Circuit, in holding unconstitutional a security program which summarily prevented merchant seamen from carrying on their vocation, stated (227 F. 2d, at p. 717):

The liberty to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job. It has been suggested that the latter is not entitled to protection of the due process clause. Bailey v. Richardson, 86 U. S. App. D. C. 248, 182 F. 2d 46, 57 . . . The plaintiffs here are citizens of the United States and the rights and liberties which they assert relate not to any public employment present or prospective, but to their right to pursue their chosen vocations as merchant seamen."

Indeed, this Court in Cammer v. United States, 350 U.S. 399, 406-407, quoted with approval the statement that an attorney has as good a right to the exercisce of his profession,

"... as the mechanic has to follow his trade, or the merchant to engage in the pursuits of commerce ... The public have almost as deep an interest in the independence of the bar as of the bench." Nor does an attorney's role as an officer of the Court make him the equivalent of a public servant. In the *Cammer* case (350 U. S. at 405) this Court pointed out that, unlike other Court officers such as marshals, bailiffs or clerks,

"... a lawyer is engaged in a private profession, important though it be to our system of justice. In general, he makes his own decisions, follows his own best judgments, collects his own fees and runs his own business."

The Supreme Court of Florida recently indicated its awareness of the irrelevance of cases involving public employees. After its decision in Sheiner v. Florida, 82 So. 2d 657, holding that the disbarment of an attorney for refusing to answer in reliance on his privilege deprived him of due process of law, that Court, on July 24, 1958, ordered further argument limited to the impact of Beilan and Lerner, supra. The Court subsequently reaffirmed its earlier position, thereby frustrating another attempt to disbar Sheiner for his invocation of the privilege. Florida v. Sheiner, 112 So. 2d 571.

The Supreme Court of Illinois is in accord. In Re: Holland, 377 Ill. 346, 36 N. E. 2d 543. In the course of holding on State grounds that the suspension of an attorney for assertion of the privilege constituted error, that Court distinguished the case from that of a policeman asserting the same privilege.

Even the New York Courts, before their turn-about in the instant case, recognized that a State does not possess the same power over private citizens that it does over public employees. In *Hecht* v. *Monaghan*, 307 N. Y. at 468-469, 121 N.E. 2d at 424, the Court of Appeals said: "In the present case, however, the petitioner is not the employee of any public body nor is he the appointee of any municipal officer. Rather, he is a private citizen whose livelihood is derived from the fares and gratuities he receives from the persons whom he serves as a licensed hack driver. He is not under the direct supervision of a public official in the performance of his daily routine, but is merely regulated with regard to certain aspects of his business. The rules applicable to the disciplining, suspension and discharge of civil employees should not be extended to include the suspension or revocation of licenses of those whose salaries are not paid from public funds."

And the Court of Appeals that had decided that an attorney could not be disbarred for refusing to yield his privilege against self-incrimination, in the Matter of Ellis, 282 N. Y. 435, 26 N. E. 2nd 967, did so in the face of a decision only six weeks earlier that a police officer could be dismissed for refusing to sign a waiver of immunity, Cantelline v. McClellan, 282 N. Y. 166, 25 N. E. 2d 972. Notwithstanding the fact that Cantelline v. McClellan was urged upon the Court of Appeals in Ellis. it held that an attorney could not be disciplined for a similar refusal.

So also the Supreme Judicial Court of Massachusetts in Opinion of the Justices, 332 Mass. 763, 126 N. E. 2d 100, held that a statute would be unconstitutional if it required the discharge of teachers in private as well as public schools solely for invoking the privilege against self-incrimination at antinquiry. Thus the Court in distinguishing between public and private employment of teachers, cogently stated (126 N. E. 2d at 103):

See brief of Petitioner-Respondent in Matter of Ellis, at pp. 24-25.

"Nothing in this opinion is inconsistent with what was recently decided in the case of Faxon v. School Committee of Boston, 331 Mass. 531, 120 N. E. 2d 772. In that case the question was whether a public board having charge of public schools could in the exercise of its judgment in a particular instance dismiss a public school teacher for refusing to testify about his relations with communism. In that case the public as represented by the school committee had the rights of an employer in the selection and retention of employees suitable to the enterprise in hand. There was no attempt to interfere generally with the petitioner's practice of his profession. The question there was whether the school committee. could be compelled to employ the petitioner in public employment. The question now before us is whether all employers public or private can be compelled not to employ a person who has exercised his constituo tional right. The difference is obvious." (emphasis is the Court's)

It is in the context of the Government as employer that the decisions in *Beilan*, *Lerner* and *Nelson and Globe* must be read. This Court was, of course, aware that it was dealing with public employees in those cases. Indeed, it is even fair to say that it emphasized that fact at a number of points. See, e.g., *Beilan* v. *Board of Education*, 357 U. S. at 405, 408-409, 410.

When read in context, it is plain that Beilan, Lerner and Nelson and Globe do not mean that the State is free to do to its licensees whatever it may do to its employees. Any other reading would seriously jeopardize many of our fundamental liberties, for millions of Americans are licensees hitherto thought to be safe from the kind of restrictions that Governments may impose upon their employees. An

extension of the doctrine of those cases to cover attorneys engaged in private practice or other licensees would not only be illogical, it would be devastating so far as constitutional rights are concerned.

It is useful to remember that the founding fathers regarded the privilege against self-incrimination as a fundamental protection of the individual and as a bulwark against the collectivism of the State, that New York too numbers the privilege among its constitutional safeguards, and that the law of every State in the Union accepts it. Consequently, there is no blinking the fact that, whatever the theory, if it were finally determined that a State may disbar an attorney solely because he relied on this universally recognized privilege, it will be taking a large step down the road to the destruction of individual rights. And that path once taken is difficult to retrace. Professor Gellhorn made the point eloquently in responding to the suggestion that the lawyer's privilege should yield to his so-called "duty of candor":

"Running counter to that view, however, is the lawyer's duty to defend rather than diminish the nation's constitutional heritage. That heritage would undoubtedly lose some of its richness if exclusion from the bar were to be predicated on invocation if a constitutional protection. No matter how frequently the courts and legal writers point out that a Fifth Amendment plea is not a confession of guilt, the lay public (and, indeed, some lawyers as well) presist in regarding the exercise of constitutional privilege as a proof of unworthiness. The bar should be able to recognize other people's insensi-

<sup>\*</sup> New York Constitution, Article I, Section 6.

tivities and misconceptions without sympathetically absorbing and, as it were, legitimatizing them. The Fifth Amendment, Dean Erwin Griswold has said, is 'a symbol of our best aspirations and our deepseated sense of justice.' Cherished for generations as a safeguard against ancient abuses-abuses that have their contemporary expression in the police states Americans abhor-the Fifth Amendment is now challenged in the name of security. Lawyers cannot afford to join in an emotional hunt for perfect security at the expense of traditional liberties. The incantious discarding of one constitutional protection cheapens others as well, for the erosion of values is a process not easy to halt." Gellhorn, Individual Freedom and Governmental Restraints, at pp. 139-140.

### CONCLUSION

In the last analysis, a lawyer continuously engaged in the practice of his profession for over thirty-seven years, whose character and fitness therefor has been certified on his admission to practice and has never since been questioned, finds himself disbarred by the lower courts for his refusal to waive a constitutional right which is one of the great prides and glories of our American system of the true administration of justice. Exercising the privilege in good faith, relying on the advice of competent counsel, supported by a number of decisions of the highest court of his own State, which that Court now effectually repudiates in these words:

"The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference be-

tween those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented,"

this petitioner has received what to him is a professional death penalty. What the Court of Appeals calls a slight difference is in reality non-existent. The tragic injustice inflicted upon petitioner demands correction by this Court and the preservation of the constitutional privilege against self-incrimination, despite its destruction that some have advocated when applied to lawyers. The affirmance of the judgment below would deprive the petitioner of his only means of livelihood, regardless of his unquestioned good character and fitness and an exemplary record and standing as a lawyer. We submit that no such miscarriage of justice based on distorted concepts of the ethical, moral or professional duties and obligations of an attorney should be countenanced by this Court. The judgment below should be reversed and the bar of this nation thus assured that the exercise of their constitutional privileges in good faith will not be construed by this Court as any evidence whatever of professional misconduct or as the automatic, ipso facto, per se relinquishment of the cherished right to continue to practice an honorable profession.

Date: August 19, 1960

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# Supreme Court of the United States

October Term, 1960

No. 84

In the Matter

ALBERT MARTIN COHEN, an attorney,

Petitioner,

DENIS M. HURLEY,

Respondent.

BRIEF ON BEHALF OF THE NEW YORK STATE
ASSOCIATION OF PLAINTIFFS' TRIAL LAWYERS
AS AMICUS CURIAE

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# Supreme Court of the United States

October Term, 1960

No. 84

In the Matter

of

ALBERT MARTIN COHEN, an attorney,

Petitioner,

DENIS M. HURLEY,

Respondent.

## BRIEF ON BEHALF OF THE NEW YORK STATE ASSOCIATION OF PLAINTIFFS' TRIAL LAWYERS AS AMICUS CURIAE

### Interest of the Amicus Curiae

The amicus curiae is a self-governing bar association consisting of New York lawyers who practice in the various fields of personal injury law. It is the New York affiliate of the National Association of Claimants' Compensation Attorneys.

The amicus curiae believes that the judgment below constitutes a serious impairment of the right to engage in the practice of law and a deprivation of the constitutional rights of lawyers. The amicus curiae submits this brief with the consent of the attorneys for both parties.

## Statement of Facts

Petitioner was subpoenaed to appear with his books and records in an "ambulance-chasing" inquiry directed to be held by the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York. No charges were filed against him. No witnesses testified against him,

Petitioner asserted his constitutional privilege against self-incrimination in declining to answer certain questions put to him and in declining to produce his books and records. The Appellate Division, while agreeing that the petitioner was entitled to assert his constitutional privilege against self-incrimination, deemed the refusal to answer and produce the aforesaid records to be a violation of his duty as a member of the Bar. Accordingly, one judge dissenting, the Court disbarred him. The Court of Appeals affirmed the order of disbarment, Judge Fuld dissenting.

## POINT I

Petitioner was denied due process and subjected to an unlawful search and seizure in violation of the Fourteenth Amendment in being summoned to appear and produce his records in an inquiry directed at him but without formal charges and witnesses subject to crossexamination.

In the view of the amicus curiae, this case presents a problem which might well be considered prior to consideration of the issue raised by the assertion of the constitutional privilege: Was petitioner denied the fair treatment required by the due process clause of the federal Constitution and subjected to an unlawful search and seizure in violation of it?

A lawyer who is the subject of a judicial investigation should not be called upon to give an accounting in the absence of formal charges supported by the testimony of witnesses subject to the protective device of cross-examination. A generalized inquiry of this sort is historically termed an inquisition. Its only modern successor is the grand jury before which the State of New York may not call a prospective defendant as a witness. People v. Steuding, 6 N. Y. 2d 214; People v. Gillette, 111 N. Y. Supp. 133 (App. Div., 1st Dep't):

The profession of the law is too valuable to be placed in jeopardy by such loosely operating procedures. There are few professions and no occupations in which the consequences of occupational expulsion are so devastating. Public disgrace, loss of livelihood and expulsion from the profession which has constituted his life's work are the disbarred lawyer's fate. See Bradley v. Fisher, 13 Wall (80 U.S.) 335, 355. Even the most routine of work, tangentially connected with legal practice, is forbidden to the disbarred lawyer. Drinker, Legal Ethics (1953), pp. 51 et seq.

This is not to question the desirability of the highest standards of behavior. There is nothing inconsistent in requiring both high standards of the professional man and strict proof and fair procedures of his prosecutors and judges. Cf. Ex parte Secombe, 19 How. (60 U.S.) 9, 13; Ex parte Garland, 4 Wall (71 U.S.) 333, 379.

Until recently, no lawyer in New York was required to defend his professional status and reputation except after precise charges of wrongdoing supported by evidence. See, e.g., Matter of Brewster, 12 Hun 109; Matter of Eldridge, 82 N. Y. 161; Matter of Kaufman, 245 N. Y. 423; Matter of Brooklyn Bar Association, 92 App. Div. 612; see also Ex parte Wall, 107 U. S. 265. The state has always had the burden of showing impropriety. In re Spencer, 206 App. Div. 806 (no opinion). That was equally true in the

United States generally. See e.g.; In re. Brown, 389 Ill. 516, 524, 59 N. E. 2d 855, 858.

In 1928 the Appellate Divisions of the First and Second Departments of the Supreme Court of the State of New York made a drastic departure from settled procedures throughout this country by authorizing a general inquiry upon ex parte applications of the Bar Associations. Matter of Bar Ass'n of City of N. Y., 222 App. Div. 580 (1st Dept.); Matter of Bracklyn Bar Ass'n, 223 App. Div. 149 (2nd Dept.). In 1928 the New York Court of Appeals gave its approval to contempt proceedings which enforced such a general inquiry. People ex rel. Karlin v. Culkin, 248 N. Y. 465.

We share the concern shown for high professional standards of behavior by Chief Judge Cardozo in the Karlin case. But we submit, with all deference, that neither history nor necessity nor the Constitution and statutes referred to in that decision justify approval of the inquisitorial process.

Chief Judge Cardozo relied in large part on the supervisory control of the Bar exercised in England. This was developed earlier by the New York Court of Appeals in Matter of Rouss, 221 N. Y. 81. But the Rouss case involved standards, not procedures. The historical references in that case do not support the procedure approved in Karlin. That case involved the contempt power of the Court, not the drastic measure of disbarment. The distinction between the two is well settled. See, e.g., People ex rel. Elliott v. Green, 7 Colo. 237, 247-48. Finally, as Judge Fuld points out below, "that case did not involve a claim of privilege; the attorney simply refused to be sworn or testify" (R. 91).

Nor do we believe that the generalized "power and control" given to the courts by the Judiciary Law, § 88, sub. 2 is authority for the quasi-grand jury procedure in-

volved herein. Whatever may have been the reasoning in 1928, when Karlin was decided, we have advanced considerably in our conception of fair procedures which, as we have been increasingly told, are the earmarks of a civilized community. See e. g., McNabb v. United States, 318 U. S. 332; Mallory v. United States, 354 U. S. 449.

While it is clear that a judicial inquiry of this nature will not be invalidated if those rigid formalities required in a criminal case are not present, it is equally clear that such an inquary lacks even the minimum due process given to citizens in their private capacity if the attorney involved is not apprised of the charges against him. Matter of Eldridge, 82 N. Y. 161; In re Claiborne, 119 F. 2d 647; United States v. Hicks, 37 F. 2d 289. The last cited case held that an attorney in a disbarment proceeding "must be informed in advance of the purpose of the proceeding and of the grounds therefor and must be afforded a fair opportunity to interrogate the witnesses testifying against him and to produce evidence in refutation on rebuttal. These are indispensable requirements."

This court has recognized that the right to practice law may not be taken away in the absence of procedural due process. Ex parte Robinson, 19 Wall. (86 U. S.) 505, Goldsmith v. Board of Tax Appeals, 270 U. S. 117. See also In re Carter, 177 F. 2d 75, cert. den., 338 U. S. 900. In the Robinson case the Court quoted from Ex parte Garland, 4 Wall. 333, that "they hold office during good behavior, and can only be deprived of it for misconduct ascertained or declared by the judgment of the court after opportunity to be heard has been afforded" (italics added).

One need not have the skepticism of such eminent lawyers as A. A. Berle, Jr. [The Legal Profession, Encyclopedia of the Social Sciences, (1937) Vol. XI, p. 343] or the late Charles Curtis [It's Your Law (1954)] to question the propriety of short cuts to enforcement of the

Canons of Ethics. The dangers of oppressive charges by disgruntled clients, jealous competitors or counsel with opposing interests are too great to justify such procedures. While it is true that judges, not laymen, sit in judgment, power in any one is a heady thing. Nothing that we have read of the actual procedures in these ambulance-chasing investigations can endear them to those who believe in dee process. See, e. g., the Record on Appeal in People ex rel. Karlin v. Culkin, supra. Finally, if this treatment is to be accorded members of the Bar, the medical profession, architects, see e. g., Florida State Board of Architecture v. Seymour, 62 So. 2d 1, and many other professional groups can be subjected to equally drastic treatment. For all licensing boards and professional societies may insist with equal force both upon high professional standards and inquisitorial means of achieving them? A recent study of the general problem of licensing points up the dangers of such . arbitrary control over the livelihood of others. Gellhorn. Individual Freedom and Governmental Restraints (1956), chap. 3, pp. 105-151.

Due process requires confrontation, cross-examination and a fair trial. Peters v. Hobby, 349 U. S. 331; Matter of Murchison, 349 U. S. 133. See also United States v. Minker, 350 U. S. 179, 188, on the "safeguards of a public adversary proceeding". If prospective lawyers are entitled to due process under the Fourteenth Amendment, Konigsberg v. California, 353 U. S. 252; Schware v. New Mexico, 353 U. S. 232, how can it be denied those sought to be ousted from the profession! We therefore agree wholeheartedly with the dissenting opinions of Mr. Justice Kleinfeld in the Appellate Division (R. 78) and of Judge Fuld in the Court below (R. 87).

The argument made above is applicable both to the oral inquiry of petitioner and the subpoena duces tecum directed to his books and records. In the latter respect the order below is subject to the additional criticism that it is an

unlawful search and seizure forbidden by the Fourteenth Amendment to the Constitution. See Harriman v. Interstate Commerce Commission, 211 U.S. 407; Ellis v. United States, 206 U.S. 246; Jones v. Securities & Exchange Commission, 298 U.S. 1.

Surely the record in this case does not show "misconduct ascertained and declared". It is bare both of charges and of evidence. A disbarment predicated upon so empty a record is a denial of due process of law.

#### POINT II

Petitioner's disbarment for asserting his constitutional privilege denied him due process and equal protection under the Constitution.

The constitutional provision against self-incrimination was adopted by New York State in 1821 and repeatedly implemented by the decisions of courts in every possible variety of circumstances. Matter of Ellis, 282 N. Y. 435; Matter of Grae, 282 N. Y. 428; cf, Matter of Levy, 229 App. Div. 62 (dictum), aff'd 255 N. Y. 223; People ex rel. Karlin v. Culkin, 248 N. Y. 465; Matter of Schneidkraut, 231 App. Div. 109; Matter of Solovei, 250 App. Div. 117, aff'd 276 N. Y. 647; People v. Kaffenburgh, 188 N. Y. 49; Matter of Cohen, 115 App. Div. 900 (opinion withheld from publication by direction of the Court).

The first Constitution of the State of New York following the ratification of the federal Constitution contained an unconditional guarantee of the privilege against self-incrimination. The present Constitution contains an equally explicit provision. Article I, § 6, provides: "•• nor shall he be compelled in any criminal case to be a witness against himself."

The only persons upon whom the State Constitution places a disability for assertion of the privilege are state

employees who assert it or refuse to waive immunity in a grand jury investigation concerning their work. Lawyers are not employees of the state and the proceeding below was not a grand jury investigation. Therefore the disability does not apply to petitioner although the Court below acted as if it did.

It would be a work of supercrogation to cite to this Court the numerous cases not involving lawyers in which, the Courts below have applied in the most liberal spirit the constitutional privilege against self-incrimination. We deem it sufficient to limit our discussion here to cases involving lawyers. These may be divided into four classes.

The first type of case, illustrated by People v. Kaffenburgh, 188 N. Y. 49, involved the lawyer's reliance upon the privilege when called as a witness upon the criminal trial of another. In that case, as here, it was argued that as an officer of the Court the lawyer had a responsibility for the administration of justice and should be required to choose between his profession and self-protection. The Court of Appeals unanimously disagreed, taking the position that lawyers were fully entitled to the protection of the privilege without imposition of penalty or disability. The same rule was applied by the Appellate Division of the Supreme Court, upon the authority of Kaffenburgh, to a lawyer who refused to waive immunity before a grand jury investigating a murder. Matter of Solovei, 250 App. Div. 117 (2nd Dep't), vif'd 276 N. Y. 647.

The second type of case involved the lawyer in an "ambulance-chasing" inquiry who failed to assert his privilege (People ex rel. Karlin v. Culkin, 248 N. Y. 465) or to assert it in good faith (Matter of Levy, 255 N.-Y. 223). In the first case the Court below declared Karlin's duty to testify "subject to his claim of privilege if his answer would expose him to punishment for crime" (248 N. Y. at 471). In the second case it noted that Levy's "claim was

a mere pretext to avoid giving non-incriminatory answers" (255 N. Y. at 225).

It is significant that the Appellate Division shortly thereafter interpreted Matter of Levy as holding that the assertion in good faith of the privilege is not ground for disbarment. Matter of Solovei, 250 App. Div. 117 (2d Dept. 1937), aff'd 276 N. Y. 647.

In the third type of ease, involving an investigation similar to the present one, the witness asserted his constitutional privilege and refused to waive immunity. There the Appellate Division made the same argument it has repeated below, Matter of Ellis, 258 App. Div. 564. But the Court of Appeals adopted the dissenting opinion of Presiding Justice Lazansky, 258 App. Div. 574, in which he stated the historic significance of the privilege, Matter of Ellis, 282 N. Y. 435. So too in Matter of Grae, 282 N. Y. 428; Matter of Schneidkraut, 231 App. Div. 109 and Matter of Solovei, 250 App. Div. 117, aff'd 276 N. Y. 647.

There is no distinction in principle or practical effect between the assertion of the privilege and the refusal to waive immunity. In both cases there is the refusal to cooperate with the authorities in the legitimate interest of self-protection. Indeed the state admitted this identity in its brief in Matter of Grae, supra, where it said that it makes "very little distinction between the refusal of a lawyer to waive immunity in a proceeding of this kind and resort by a lawyer to his privilege against self-incrimination" (Petitioner-Respondent's Brief, p. 10, in Matter of Grae, supra).

Similarly, in Matter of Solovei, 250 App. Div. 117, aff'd 276 N. Y. 647, involving a refusal to waive immunity, the Appellate Division expressly relied upon the decision in People v. Kaffenburgh, 188 N. Y. 49, involving the assertion of privilege.

The fourth class consists of disciplinary proceedings instituted against lawyers upon the basis of formal charges.

The amicus curiae is aware of no case in New York in which, even with the added protection of formal charges, a lawyer was compelled to testify. It is only a failure to refute the evidence against him which is regarded as significant. Matter of Randel, 158 N. Y. 216.

The great weight of authority, particularly the recent cases in other jurisdictions, supports this position of the amicus curiae. In one of the earlier cases, State ex rel. Reynolds v. Circuit Court, 193 Wis. 132, 144, the Court required a lawyer to be sworn but added: "If in the course of his examination questions were asked that tended to incriminate him, Mr. Rubin could then claim his privilege." This case was relied upon by the Bar Association whose petition resulted in the decision in Matter of Brooklyn Bar Association, supra, and Matter of New York City Bar Association, supra. See similarly, In re Vaughan, 189 Cal. 491, 497.

The most notonious effort in recent years to undercut the constitutional privilege of lawyers was attempted and failed in Florida. In Sheiner v. State, 82 So. 2d 657, the Supreme Court of Florida held that refusal to answer questions concerning Communist Party membership in disbarment proceedings was protected by the privilege. The decision is particularly significant because the Court also agreed that membership in the Communist Party forfeited the right to practice law (82 So. 2d at 659). But the Court observed that if lawyers were required to surrender the constitutional privilege, other constitutional rights including the right to oppose an unlawful search and seizure would also be in jeopardy.

In Petition for Revision of or Amendment to Integration Rule of Florida Bar, 103 So. 2d 873, the same Court refused to make a refusal to answer questions a ground for disciplinary action. To the same effect: In re Holland, 377 Ill. 346, 36 N. E. 2d 543. The decision below is particularly questionable since it comes in the wake of unsuccessful proposals for legislation with the same objective. In 1953, the Committee on Law Reform of the Association of the Bar of the City of New York opposed "the enactment of a statute subjecting law-yers to disbarment proceedings if they refused to sign waivers when called before a court of competent jurisdiction to testify concerning their conduct as lawyers or performance of their duties as members of the Bar" (Report No. 2029, April 22, 1953). In answer to the argument made by the Court below (R. 86) that the lawyer had a constitutional privilege as a citizen but not as a lawyer, this Committee aptly noted that "these laborious distinctions show how hard it is to split the human personality in any precise way for jurisdictional purposes" (Report No. 2929, p. 3).

Two years later the Association's Special Committee on the Matter of Communist Lawyers made a Report relevant to our subject (Report No. 2f23, Nov. 29, 1955). Although it regarded Communist activities as inconsistent with the lawyer's professional obligations, it stated that "to make the refusal to testify the sole ground for disbarment might well be unconstitutional and certainly contrary to the decisions of the Court of Appeals. Matter of Grae, 282 N. Y. 428, and Matter of Ellis, 282 N. Y. 435", Id. at p. 10. It is not without significance that the last two cited cases were interpreted by this impartial committee in the manner suggested by the amicus curiae. The Report was adopted by the Association at its stated meeting of January 17, 1956.

We submit that at no time since the emergence of the constitutional privilege against self-incrimination in Anglo-American jurisprudence has a lawyer's assertion in good faith of the constitutional privilege been deemed ground for disciplinary action. No judicial decision, no authoritative text suggests that the lawyer has surrendered his constitutional rights upon being admitted to the Bar. See

e.g. Drinker, supra, pp. 42, 303-308, Thornton, A Treatise on Attorneys at Law (1914) passim. No canon of ethics or implementing administrative opinion has so held or advised. See e.g. Opinion of the Committee on Professional Ethics and Grievances (American Bar Ass'n. 1957) passim. Therefore, as the Court below elsewhere said:

"It is a just inference that our alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period never in fact had an existence."

McGuigan v. D. O. & W. R. R. Co., 129 N. Y. 50, 56.

The question which must occur after the foregoing recital is how the Court below concluded that petitioner could be disbarred.

The foundation of its argument was its reference to Matter of Rouss, 221 N. Y. 81, where it was held that membership in the bar is a privilege based upon good character. As we have previously noted, supra, page 4, Matter of Rouss involved a disbarment based upon revelation of crime, not an attempt to compel a choice between surrender of the privilege and loss of membership in the Bar. While we most respectfully differ with the view expressed therein that disbarment is neither penalty nor forfeiture, that issue is not in the present case and will not be discussed herein.

The next point made, is that a lawyer has a "special position" with the duty of "loyal cooperation" in judicial investigations (R. 85). None of the cases cited by the Court below involve assertion of the constitutional privilege. The duty of "loyal cooperation" plainly must yield to other common law and statutory rules such as the attorney-client and marital privileges. A constitutional right is entitled to equal deterence.

Analysis of the problem is not advanced by talking in terms of obligation rather than privilege. The lawyer's obligation to the administration of justice is no greater here than in Matter of Solovei, 276 N. Y. 647 and People v. Kaffenburgh, 188 N. Y. 49. In each case the issue is whether the ground of declination is legally justified. It is only where, unlike here, the Constitution itself withdraws its absolute protection (Canteline v. McClellan, 282 N. Y. 166), that the obligation becomes relevant and a disability may be imposed.

Matter of Grae, supra, and Matter of Ellis, supra, are interpreted by the Court below as authorizing the refusal to waive immunity, not the assertion of the privilege itself. We have already shown that there is no distinction between the two (supra, p. 9). So narrow a view of these decisions is inconsistent with that Court's discussion in Grae and Ellis of the meaning and importance of the constitutional privilege.

The Court below also notes that *Grae* and *Ellis* had "offered to answer all pertinent questions" (R. 87). We do not believe that this changes the situation. For had their offer to testify been accepted, they would have achieved immunity from prosecution, precisely the result achieved by appellant herein by his assertion of privilege. See Judge Fuld's dissenting opinion below (R. 89).

Lerner v. Casey, 2 N. Y. 2d 355, aff'd 357 U. S. 468, relied upon below, does not support the decision below, for the following principal reasons: (1) Lerner involved public employment which historically is subject to governmental control, cf. Cammer v. United States, 350 U. S. 399, 405; (2) such employment may be terminated by quasijudicial procedures, whereas disbarment requires a judicial procedure, Ex parte Robinson, 19 Wall. (86 U. S.) 505, 508; Matter of Eldridge, supra; Matter of Percy, 36 N. Y. 651; Matter of Anonymous, 22 Wend. 656; In re Att'y, 83 N. Y. 164; Matter of Joseph, 125 App. Div. 544; (3) in Lerner, unlike here, a statute explicitly authorized the procedure

followed; (4) Lerner was held to have waived his claims as to lack of procedural due process by failing to exhaust his administrative remedy; (5) this Court deemed the State justified in the drastic action because of problems relating to national security.

To impose disbarment under the circumstances here described nullifies the constitutional privilege under Article I, § 6. It directly contradicts all that this Court has said about the constitutional privilege in Ullmann v. United States, 350 U. S. 422, Slochower v. Board of Education, 350 U. S. 551, and Grunewald v. United States, 353 U. S. 391. The lawyer, who alone among persons not employed by the government, is expelled from his profession, therefore is denied the equal protection to which he is entitled under the Fourteenth Amendment. A judicial rule penalizing use of the privilege is as much a denial of due process as it was in the Slochower case, where it resulted from legislative enactment. In both cases there is lacking the "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process, Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 302. Slochower v. Board of Higher Education, 350 U.S. at 559.

#### CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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## Supreme Court of the United States

October Term, 1960

No.

In the Matter of .
ALBERT MARTIN COHEN,

Petitioner,

v.

DENIS M. HURLEY,

Respondent.

#### BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE

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## Supreme Court of the United States

October Term, 1960

No.

In the Matter of Albert Martin Cohen,

Petitioner.

v.

DENIS M. HUBLEY.

Respondent.

## BRIEF OF NATIONAL LAWYERS GUILD AS ANICUS CURIAE

#### The Interest of the National Lawyers Guild

The National Lawyers Guild, hereinafter referred to as "The Guild", a national bar association, deeply interested in the rules and standards governing the practice of law in the United States, submits this brief amicus curiae in support of the petitioner in the above entitled proceeding. The Guild deeply appreciates the opportunity made possible by the consent of counsel for both the respondent and the petitioner to present its views on the far-reaching issues involved.

Petitioner appeals from a judgment of the New York Court of Appeals affirming an order of the Appellate Division, Second Department, permanently disbarring him from the practice of law. Said disbarment was predicated upon a charge of "obstructing a judicial inquiry", such obstruction having consisted solely of asserting the privilege against self-incrimination in a judicially ordered inquiry

into improper solicitation. The Guild believes that the decision appealed from contravenes the Fourteenth Amendment both by denying due process of law to an attorney and by limiting the independence of the bar on which the right to counsel depends. The Guild recognizes the need to exclude from the bar those unable or unwilling to adhere to the high standards of professional practice which the administration of justice and the protection of the public from fraud and malpractice require. At the same time, the Guild recognizes that the administration of justice and the protection of the public cannot be secured by achieving laudable ends by dubious means.

### ARGUMENT POINT I

A license to practice law may not be revoked unless' the highest standards of due process are applied.

A license to practice law is not held at the mercy of the state (Schware v. Board of Law Examiners, 353 U. S. 232; Konigsberg v. State Bar of California, 353 U. S. 252; exparte Garland, 4 Wall. 333; exparte Robinson, 19 Wall. 505). The state may, of course, establish standards for the granting and retention of such a license, but it may not either by imposing impermissible standards or by refusing to license those who meet permissible standards exclude from its bar those who reasonably qualify.

There are two reasons why the lawyer is given this measure of protection. There is a general right to pursue a trade or calling after the requisite measure of time and effort has been invested in study and preparation (ex parte Robinson, supra), and there is the overriding social interest in an independent Bar, free to champion unpopular or disfavored as well as "respectable" causes. The Guild as a bar association wishes to address itself to this latter consideration.

It is a function of a lawyer in a free society to protect the rights of his client. If the client meets with popular or judicial antipathy the lawyer who champions him may find himself under attack. It is true that persecution of lawyers is rare, but the level of protection given to a lawyer who faces persecution must be measured by the level of protection given to a lawyer in the ordinary exigencies of practice. If a stafe can disbar a lawyer without proof of misconduct solely because he has refused to state under claim of constitutional privilege how he obtained three hundred and four (304) negligence cases, the same logic would allow a state to disbar a lawyer without proof of misconduct solely because he refused to state under similar claim how he obtained a single civil rights case. (The useof barratry statutes to intimidate civil rights lawyers is not new; see Harrison v. National Association for the Advancement of Colored People, 360 U. S. 167).

What the Appellate Division, acting as a licensing agency for lawyers, has done in the instant case is to require a lawyer to yield his membership at the bar upon his assertion of a constitutional privilege. Of course it did not couch its disbarment order in these terms. But the assertion of constitutional privilege is characterized as "obstruction of a judicial inquiry" and no other specification of "obstruction" is offered. Many constitutional rights are "obstructive" in nature starting with a writ of habeas corpus. That which is a shield to one man must be an obstruction to another. If a lawyer can be compelled to yield one of his "obstructionist" rights as a condition of his continued good standing at the bar, he may some day be required to yield others such as freedom from unreasonable search and seizure, the right to a specific statement of the charge put, and even the right to have counsel present at all stages of the inquiry (see Sheiner v. Florida, 82 Southern 2nd, 657, concerning opinion of Mr. Justice Floyd). The right to stand mute and force the accuser to come forward with charges and prove his case certainly should not be the first to go.

Nor can the measure of protection to which a lawyer is entitled with regard to his professional license be lowered by characterizing him "an officer of the Court" (see Konigsberg v. State Bar of California, 353 U. S. 252 at 273, citing Cammer v. U. S., 350 U. S. 399). The lawyer, as indicated by the Cammer case, was never intended to be put in the same class as a law clerk or a bailiff.

The lawyer is not, by virtue of his professional position, hired and paid by a unit of government. His office cannot be abolished by the state. "In general he makes his own decisions, follows his own best judgments, collects his own fees and runs his own business" (Cammer v. U. S., supra). He is expected to maintain a healthy independence so that he may stand, if necessary, between man and his sovereign.

The difference between the lawyer and the court clerk or bailiff is best illustrated by reciting the case of the lawyer on government payroll. Such a lawyer, like the clerk or bailiff, could have his employment terminated under innumerable circumstances, which would not justify disbarment (such as abolition of the job). Moreover, such a lawyer could be precluded as a condition of continued employment from engaging in certain types of political activity (see United Public Workers v. Mitchell, 330 U. S. 75); thus a limitation upon the exercise of constitutional right is shown to be an incident of government employment rather than of professional character.

If an attorney for a governmental department were to refuse to respond to orderly inquiry on grounds of possible self-incrimination, he could be discharged from his employment solely because of his unresponsiveness (see Lerner v. Casey, 357 U. S. 468; Beilan v. Board of Education, 357 U. S. 399; Nelson and Globe v. County of Los Angeles, 362 U. S. 1). But there is no basis for the assumption that such an individual could be deprived of his professional license and denied the right to engage in his choson calling elsewhere.

In short, Lerner v. Casey, supra; Beilan v. Board of Education, supra, and other cases cited by the New York Court of Appeals in support of the proposition that refusal to testify on constitutional grounds warrants loss of position as "an officer of the Court" have no application to the lawyer. These cases apply to civil servants enjoying such statutory protection as the state has chosen to give them. The lawyer, on the other hand, derives his professional independence from the constitutional right to counsel; he is a class apart, required to take risks and protected in their taking because he, and the judicial system of which he is an integral part, can function in no other way.

#### POINT II

Courts, although possessing power to discipline lawyers, can exercise that power only under law. In this case, the Court has no power under law to act against this respondent, since there exists no law, rule, regulation or canon which subjects his conduct herein to disciplinary action.

The Court has the power to conduct general investigations to promote the administration of justice. Out of such an investigation may come rules regulating practice and professional relationships with courts, clients and brother lawyers, such as the rule regulating contingent fees in negligence cases (see Gair v. Peck, 6-N. Y. 2d 97).

The Court also may conduct an investigation into one or another area of litigation, such as solicitation, in its supervisory capacity over the administration of justice. It may authorize such investigation to be conducted before one or another judge or referee and empower him to subpoena persons to testify (see *People ex rel. Karlin v. Culkin*, 248 N. Y. 465). When a lawyer is so subpoenaed, he is under the same obligation as any other witness and may

assert the same rights and privileges, including the privilege against self-incrimination (see *People ex rel. Karlin* v. Culkin, supra).

But the additional power which the Court may exercise over lawyers permits the Court to authorize or institute disciplinary proceedings against an attorney, who in the course of the investigation commits such acts or revealed to have committed such acts as constitute evidence of unfitness to practice law. Such acts include misconduct toward clients or courts, such as embezzling funds, improper solicitation, or gross contempt of court, and conviction of a felony or other crime involving moral turpitude.

In the absence of such acts and evidence to establish them, the Court has no disciplinary power. The refusal of the lawyer to incriminate himself is not such an act, even if the Court sincerely deems such refusal an impediment to its investigation. The showing must be made that the lawyer committed some act which he had no right to commit. Short of that, the lawyer is in the same position as the layman-witness who in the view of the Court is not as helpful as the Court might wish; greater responsiveness cannot be coerced by threatening the loss of professional status and livelihood.

It must be remembered that the Court is acting as licensor and in its judicial capacity at the same time. It is dealing with the profession which it may regulate, but which it must allow to remain independent.

It will not do for the licensing court to be given total procedural leeway, subject to review on the question of abuse in particular cases. While widespread intimidation is unlikely, there is always the chance that the exigencies of a particular inquiry or of a particular public clamor will lead to acts which will have the effect of harassment even if an ultimate order of disbarment or suspension does not result.

The power to act is therefore carefully circumscribed (Cammer v. U. S., 350 U. S. 399). It depends upon an act of misconduct, a breach of the applicable laws, rules, regulations or canons, stated and proved in conformity to law, and under a procedure adhering to the standards of due process guaranteed by the Fourteenth Amendment.

#### CONCLUSION

The judgment disbarring petitioner should be reversed.

Respectfully submitted,

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ABRAHAM UNGER, HERMAN B. GERRINGER, JONATHAN GOLDBERG, of Counsel. IN-THE

## Supreme Court of the Anited States

OCTOBER TERM, 1960

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IN THE MATTER OF

AEBERT MARTIN COHEN, an attogney.

Petitioner.

DENIS M. HURLEY.

Respondent.

# BRIEF FOR THE NEW YORK CIVIL LIBERTIES UNION AMICUS CURIAE

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IN THE

## Supreme Court of the United States

OCTOBER TERM, 1960

No. . . . . .

In the Matter of ALBERT MARTIN COHEN, an attorney,

Petitioner.

DENIS M: HURLEY,

Respondent.

## BRIEF FOR THE NEW YORK CIVIL LIBERTIES UNION AMICUS CURIAE

#### Statement of Interest

The New York Civil Liberties Union is interested in this proceeding because the issue presented raises a graye question of civil liberties: whether a member of a profession, in this case, the legal profession, may be coerced into waiving the privilege against self-incrimination under threat of the cancellation of the license to practice that profession.

It is apparent that the license to practice a profession, especially after it has continued for 38 years, as in this case is of great value: The license has yalue, among other things, as a means of earning one's livelihood, and

is thus of great economic importance to the holder of such a license. Schware v. Board of Examiners, 353 U.S. 232, 238; Cammer v. United States, 350 U.S. 399.

#### Jurisdiction Lies in This Court

It follows that a threat of disbarment from practice is a powerful weapon toward the destruction of the privilege against self-incrimination, guaranteed by Art. I, sect. 6 of the Constitution of the State of New York. The attempt in this proceeding to destroy that constitutional protection by means of coercion through disciplinary measures against the petitioner is a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

Although the privilege against self-incrimination is granted by the State, nevertheless, this Court has jurisdiction to inquire whether the State courts have applied the provisions of the State Constitution in a reasonable manner, consistent with due process. Therefore, a Federal question is presented.

#### POINT I

# The petitioner was denied due process of law in violation of the Constitution.

The petitioner is a person entitled to all the rights and protections of the Federal Constitution. The fact that he is an attorney-at-law does not serve to deprive him of the rights any other person has. Had he been arrested on a charge of unlawful solicitation (a charge which the record does not make, since the only issue here is his refusal to answer questions on the grounds of self-incrimination), it could not be disputed that the petitioner would have had the right to refuse to answer questions that might incriminate him.

It was said by the State courts that because petitioner refused to answer, the inference is clear that he is unfit to be a lawyer, because candor is a mark of a lawyer.

That conclusion violates two cardinal principles of due process:

- 1. The inference that a person is unfit to be a lawyer because he pleads against self-incrimination has no support in reason. This Court has held that no inferences of wrong-doing can be drawn from the plea because a keystone of civil liberties in this country is that all persons are innocent until proved guilty. Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551; Quinn v. United States, 349 U.S. 155.
- 2. Nevertheless, the State courts held that a duty exists upon an attorney to cast aside his constitutional protection and speak up; otherwise he is deemed unfit to be a fawyer. He is no longer fit to practice, it was said, because he was not candid to the Appellate Division. The argument that a lawyer must give up a constitutional right or else be penalized with disbarment is untenable. Were this argument adopted, like application could be made as to all licensees, be they physicians, merchants, peddlers, or motorists.

There is no special injunction in law that requires a lawyer to be candid. It was said by the courts below that canons of ethics require it. In other words, the pronouncements of other members in the profession what a lawyer should do, even to the sacrifice of constitutional rights was deemed more controlling than the Constitution. Due process requires more. It requires that the deprivation of liberty and property be by the law of the land, not by principles announced by other lawyers.

The result reached in the State courts rested on the canon of ethics. The result thus is not supported by the law of the land and by itself is a denial of due process.

The courts below ruled that a mere refusal to speak was a sufficient violation of the canons of ethics and therefore was paramount to the claim of the privilege to remain silent. Distinction must be made, however, between refusal to speak and refusal based upon a claim of self-incrimination made in good faith. The difference is a significant one. The coercion to yield a constitutional privilege under threat of discipline, is the crucial point of this case. A lawyer might be required to speak on matters that may not give rise to the constitutional privilege. But when the privilege is invoked, he should not be compelled to waive it in fear of consequences such as disharment.

Nor can the state impose a condition for the grant or exercise of a license that would deprive a person of a constitutional right.

In Frest v. Railroad Commission, 271 U. S. 583, the Supreme Court said:

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it, upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is unconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

It follows from what has been said here that this petitioner was faced with a serious dilemma, either to maintain silence and be disbarred, or else speak and possibly incriminate himself. The choices open were disbarment or incrimination. The protection afforded by the Constitution was intended to save a person from being placed in this dilemma. It is the dilemma of the screw and the rack. Which form of torture is preferable? The Constitution says that neither torture is worthy the dignity of man.

When contemplating this problem, one cannot omit the historical antecedents of the privilege. In essence, the tortures, including the screw and the rack, that were used in the past to extract confessions from an unwilling witness gave rise to the present constitutional provision. History and experience have given their verdict that the dignity of man can best be preserved by discouraging illicit means, such as involuntary self-incriminating testimony.

Under similar circumstances, this Court in a case involving a public employee, held that it was a denial of due process under the Federal Constitution to extort a waiver of the constitutional privilege by depriving the employee of the means of earning a livelihood. Slochower v. Board of Higher Education of the City of New York, 350 U. S. 551. See also, United States v. Lovett, 328 U. S. 303, 316.

#### POINT II

# The Nelson-Globe, Beilan and Lerner cases are distinguishable.

The cases of Nelson and Globe v. County of Los Angeles, 362 U. S. 1; Beilan v. Board of Education, 357 U. S. 399 and Lerner v. Casey, 357 U. S. 468, affg. 2 N. Y. 2d 355, were urged below as dispositive of the Federal issues raised here.

In those cases, county employees of Los Angeles, a teacher employed by Philadelphia and a subway conductor employed by the City of New York, respectively were discharged because Globe refused to testify before a Con-

gressional Committee inquiring into subversion, Beilan refused to answer questions referring to membership in the Communist Party, and Lerner because he pleaded the privilege against self-incrimination when asked similar questions. This Court upheld their dismissals as employees on the ground that their pleas in each case indicated unfitness for their employment:

But there, the emphasis was on their employment. Nelson-Globe, the latest case, the dismissal was bottomed on "insubordination" by an employee. It is the relationship of employer and employee that enabled the control to apply. Here, there is no question that the petitioner is not an employee of the Appellate Division. Had the petitioner been employed as a librarian by that court and had he been interrogated by it to account for missing books, and had refused to answer on the ground of self-incrimination. his case would have a kinship to the decided cases, although those cases are further qualified as security risk cases of public employees. The relationship of master and servant is based on contract, and one of its implied conditions is that the employee must account for the matters entrusted. to him. Otherwise the relationship could not operate effectively.

The appellant, however, is not an employee of that Court. He is an independent private practitioner, who derives no emolument from the State or any contribution toward payment of the overhead costs of his occupation Cammer v. United States, 350 U.S. 399, 405.

No doubt, duress was implied in subjecting the employee in the above cases to the alternative of losing his position as the price for silence. But the Court in balancing competing interests, required the employee to yield his constitutional right to what was deemed of greater significance, the security risk of the employee in his employment. Moreover, to implement the power of interrogation, the statutes in question specifically provided for the loss of employ-

ment as a consequence of refusal to answer questions, and it should be emphasized, were limited in scope to the problem of security risk. In the context of the country's security only has this Court decided it weightier for the employee to surrender his constitutional privilege.

# There Is No Demonstrated Causal Relationship Between Candor Upon Inquisition and Suitability to Be a Lawyer

Another feature that distinguishes those cases is the legal conclusion in them that the employees risk was rationally relevant to his suitability as an employee. this case the constitutional issue depends upon the conclusion whether the refusal to speak renders a lawyer unsuitable for the practice of his profession. Candor by the lawyer is what the Appellate Division emphasized in this case as the essential test of suitability to practice the profession. Due process requires that a rational connection exist between the silence and unfitness for professional Wieman v. Updegnaff, 344 U. S. 183, 191. This has not been met here. The appellant has practiced his profession for 38 years; it can be presumed that his . competence as a lawyer had been dependent on factors other than candor. Candor upon interrogation has no more special meaning in the case of a lawyer than it would for any other licensee, say, a motorist. Candor helps the interrogator prove his case. In this respect candor has value. It comforts the inquisitor and spares him the necessity of proving his case by his own efforts. In the practice of law itself, it is of course desirable and necessary that a lawyer be candid with his clients and those with whom he deals. So is it a virtue for a plumber, radio mechanic or butcher. But a visit by interrogators is not the practice of his occupation. In that capacity he is acting as a private person with all constitutional privileges.

Had a policeman visited the petitioner, there would have been no question but of his right to remain silent. Why is he less fit to be a lawyer because he is questioned by another public officer? There is no rational distinction. In both cases his answers might incriminate him, and in both cases he is less than candid. It therefore follows that lack of candor is no test of suitability, whether it be before a peace officer, a grand jury or a court. And therefore, the constitutional privilege attaches.

#### No State Law Covers the Consequences of Invocation of the Privilege by a Lawyer

Stress should be placed on the complete absence of a law covering the consequences of exercising the privilege. In all the cases decided by this Court there are to be found provisions which put the employee on notice that he would be discharged for using the privilege, and, therefore, he was forwarned of the penalties. In that respect there was some adherence to the requirements of due process. Winters v. New York, 333 U. S. 507. Here there is none. The same Constitution which grants the privilege against self-incrimination, also provides for the penalty that is to be visited upon public officers who invoke the privilege before grand juries. Art. I, Section 6, reads:

"No person shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law."

The State Constitution is specific as to a "public officer." The inclusion in clear text of this group indicates an intent to exclude the others. The section applies to public employees and to no others. Since it has been amply demonstrated that a lawyer with a private practice is not a public officer, it is clear that the law does not apply to him.

Were it intended that a lawyer and other licensees who operate independently should fall within its scope, it would clearly have so provided. The failure to do so, indicates his exclusion.

The language of this constitutional provision emphasizes as few arguments can do, that when disqualification was sought to operate against those who invoked the privilege, it was effectuated only by a constitutional provision. Hence, by all the more force of reason, the absence of a constitutional provision against persons not in the public employ, leads to the conclusion that a court cannot spell out disqualification when the privilege is invoked.

It follows that the courts below in construing the constitutional privilege failed to support their conclusion by any rule of law, other than the broad ad hoc determination that the conduct prescribed was within the powers of a court.

Respectfully submitted,

Counsel, New York Civil Liberties
Union

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Office Supreme Court, U.S.

SEP 15 1960

IN THE

JAMES R. BROWNING, Clerk

### Supreme Court of the United States

October Term, 1960 :

No. 84

In the Matter

of

ALBERT MARTIN COHEN, an Attorney,

Petitioner,

DENIS M. HURLEY,

Respondent.

BRIEF, AMICUS CURIAE, OF THE CO-ORDINATING
COMMITTEE ON DISCIPLINE CREATED BY THE
ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK, THE NEW YORK COUNTY
LAWYERS' ASSOCIATION AND THE
BRONX COUNTY BAR ASSOCIATION, IN SUPPORT OF
RESPONDENT

HENRY WEINER

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ALLEY HARRIS
DANIEL J. McMasion
With him on the brief

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ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK, THE NEW YORK COUNTY
LAWYERS' ASSOCIATION AND THE
BRONX COUNTY BAR ASSOCIATION, IN SUPPORT OF
RESPONDENT

#### Statement of Interest

In the exercise of its inherent power to supervise the professional conduct of attorneys, the Appellate Division of the Supreme Court of the State of New York, First Department, by order made and entered on February 3, 1959, authorized and directed the Co-ordinating Committee on Discipline, created by the Association of the Bar of

the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association, comprised of David W. Peck, Jacob Burns and Harry Lesser, to make a continuous examination and study of the statements of retainer and closing statements filed in the First Department by attorneys retained to prosecute claims for damages for personal injuries resulting from accidents, for the purpose, among other things, of observation, consideration and, where necessary, correction of the professional conduct of attorneys and those employed by or associated with them in the handling of personal injury claims. A preliminary report of the work of the Co-ordinating Committee is contained in an address delivered on November 5, 1959 by Jacob Burns to the New York County Lawyers' Association which was reprinted in greater part in the New York Law Journal of December 3rd and 4th, 1959and this reprint is appended hereto as Appendix I.

The massive scope of the problem is indicated by the fact that presently approximately 150,000 such statements of retainer in accident cases, as well as approximately 50,000 closing statements, are filed annually in the First Department which includes the Counties of New York and Bronx.

The Co-ordinating Committee on Discipline has obtained the consent of the parties to this appeal to file a brief; amicus curiae, believing that the question presented to this court is one of great public importance. We support the position of the respondent here, as we did in the court below.

#### **Opinions Below**

Petitioner was duly admitted to practice as an attorney in the courts of New York in 1922, and during the period from 1954 to 1958 filed 304 statements of retainer in negligence cases, either in his name or the name of his firm (Cohen and Rothenberg). He was duly subpoenaed to testify before the Judicial Inquiry into the practices of attorneys in negligence cases being conducted under the supervision of the Appellate Division, Second Department, and to produce his records with respect to such cases before the Justice designated to conduct such inquiry. He appeared at two separate hearings, and on the advice of his counsel invoked his constitutional privilege against self-incrimination, and refused to answer numerous pertinent questions on that ground, and refused to produce his records. It is not disputed that petitioner asserted his constitutional privilege in good faith and that as a citizen has a perfect right to do so. The facts are virtually conceded by the parties to this appeal.

Petitioner asserted the privilege against self-incrimination approximately 68 times in refusing to answer questions addressed to his professional conduct, for example: his association with other attorneys; whether he used laymen to settle negligence cases for him; the number of employees in his law office; whether he paid police officers, hospital and/or prison employees for referring negligence cases to him; whether he knew or had relationships with eight specific laymen, and whether he employed so-called "runners" to solicit retainers of personal injury claims.

Since an attorney-at-law owes a duty, as an officer of the court, to account for his professional conduct when an appropriate inquiry is made with respect thereto by an order of the Appellate Division, and petitioner having refused to do so, disciplinary proceedings were brought against him. His answer admitted the facts set forth in the petition in said proceeding and merely contested the legal consequence thereof, contending that there was no basis for any disciplinary action.

The Appellate Division rendered a decision (one Justice dissenting) disbarring petitioner unless within thirty days after the entry of said order he answered before the Justice presiding at the Judicial Inquiry all relevant questions and produced before such Justice all relevant records in accordance with the subpoena duces tecum. Petitioner elected not to answer the questions put or produce the records sought within the thirty day period hereinabove mentioned, and appealed the aforementioned order to the Court of Appeals. The Court of Appeals rendered a decision affirming the order of the Appellate Division (one Justice dissenting).

#### **Summary of Argument**

First, we contend that this appeal should be dismissed for lack of a substantial federal question since, in the state court proceedings below, petitioner was not deprived of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

However, in the event this Court believes that a substantial federal question is involved, we contend that the decision of the court below should be affirmed for the following three reasons:

1. The character of an attorney-at-law and his fitness to continue his membership at the Bar are always "at issue." In the State of New York the privilege to practice law is granted by the Appellate Division of the Supreme Court, and whenever the Appellate Division, based on facts presented to it, deems that an attorney no longer possesses that high degree of character and fitness requisite in an attorney-at-law it can take that privilege away. While it is not disputed that an attorney, as any other citizen, has

the right to invoke his constitutional privilege against selfincrimination, he nevertheless, by so doing, can create such a cloud as to his character and fitness to continue as a member of the Bar, that the Appellate Division which, in the final analysis, is charged by the provisions of Section 90(2) of the Judiciary Law of the State of New York with the duty of maintaining the purity of the Bar, and has the inherent power to do so, may in a particular case, as it did here, determine that the conduct of the attorney in refusing to answer pertinent questions put to him by a duly authorized Judicial Inquiry, such as whether the attorney, who handled a large volume of negligence cases, hired or paid so-called "runners" to "chase" and solicit for him retainers of personal injury claims, and whether he paid police officers, hospital and/or prison employees for referring such cases to him, constituted professional misconduct warranting disbarment.

- 2. Petitioner was not disbarred without due process of law. The court did not appoint a Referee in the disciplinary proceeding to conduct an adversary-type hearing, because the answer of the petitioner in the disciplinary proceeding admitted all of the allegations of fact alleged against him. Inasmuch as a Referee in a disciplinary proceeding is charged only with the duty to hear and report the facts, the court below had no issues of fact to refer to a Referee. It is up to the court to determine whether the facts in any particular disciplinary proceeding justify the disciplining of an attorney and the extent of such discipline.
- 3. Disbarment of petitioner by the court below was not absolute; he was given a further opportunity to answer, within a period of thirty days, the questions put to him, and if he co-operated, he was granted leave to apply to vacate the order of disbarment.

#### ARGUMENT

#### POINT I

This appeal should be dismissed for lack of a substantial Federal question.

The Appellate Division of the Supreme Court of the State of New York, which admitted petitioner to practice had the right at all times to inquire into his continuing fitness to practice.

The inherent power of a State to regulate the admittance, supervision and control of attorneys is well established. Gair v. Peck, 6 N. Y. 2d 97 (1959) cert. denied 361 U. S. 374.

Mr. Justice Frankfurter of this Court stated in *Theard* v. *United States*, 354 U. S. 278, 1 L. ed. 2d 1342, 77 S. Ct. 1274 (1957), at page 281:

"It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in Konigsberg v. State Bar of California, 353 U. S. 252, L. ed. 2d 810, 77 S. Ct. 722, and Schware v. Board of Bar Examiners, 353 U. S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, to sit in judgment on . . . disbarments. . . "

These narrow limits were defined by Mr. Justice Black of this Court in the case of Schware v. Board of Bar Examiners, 353 U. S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752 (1957), to mean at pages 238 and 239:

"A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment..."

As Professor Bennett of the University of Utah stated in 46 A. B. A. J. 705 (July 1960):

So traditional has been the exercise of control by a state over admission to its Bar and the subsequent surveillance of admitted practitioners that reference to constitutional premises is seldom made. Sanctioned by the historical development of our federalist system, by reason of reserved powers not explicitly or impliedly granted to the federal authority, and because the attorney is in the highest sense an officer of the court in the general administration of justice, the practice of law has been subjected to regulation by the state in the public interest."

All of the arguments hereinbelow made with respect to Point II apply with equal force to Point I, since, if the petitioner was not deprived of due process of law, there is lack of a substantial federal question.

## POINT II

Petitioner was not deprived of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

(a) The record below in the instant case demonstrates convincingly that there was no lack of due process.

Petitioner was summoned before a Judicial Inquiry being conducted under the supervision of the Appellate Division, Second Department, of the Supreme Court of the State of New York. The power of the State of New York to regulate the admittance, supervision and control of attorneys is vested by statute, \$90(2) of the Judiciary Law of the State of New York, in the Appellate Divisions of the Supreme Court of the State of New York. The scope of the Judicial Inquiry below is set out very specifically in the order of the Appellate Division, Second Department, of January 21, 1957 to be (R. 19):

- "(1) With respect to the alleged improper practices and abuses by attorneys and counselors at law in Kings County, and by persons acting in concert with them, as alleged in said petition;
- "(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;
- "(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and
- "(4) With respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them; and it is further..."

In other words, the judicial investigation here undertaken was not into any attorney's unorthodox political beliefs or political associations or into any attorney's opinions about matters of public interest or any attorney's defense of politically unpopular causes or defendants.

At petitioner's first appearance before the Judicial Inquiry on October 28, 1958, he was given a copy of the abovementioned order authorizing the inquiry by the Judge presiding, as appears from the court reporter's notes (R. 23). Before any questions were asked of petitioner, the Judge presiding, after petitioner had finished examining the order, had the following conversation with petitioner (R. 23):

"The Court: If there is any question you want to ask feel free to do it. Is there anything you want to state or ask about at the present time?

"The Witness: No, your Honor."

(b) All of the questions addressed to petitioner below were within the scope of a duly authorized Judicial Inquiry concerned with his continuing fitness to practice law.

There then began the examination of petitioner. Petitioner refused to answer all the questions asked of him (and these were addressed to his professional conduct) except to acknowledge that he was admitted to practice law in the Second Judicial Department of the Appellate Division of the Supreme Court of the State of New York. in December, 1922, on the ground that answers to the questions might tend to incriminate or degrade him. He availed himself of the privilege against self-incrimination nine times at his first appearance. The nature of the questions was as follows (R. 24-27): Was the petitioner a law partner of one Louis Rothenberg; did he know if Louis Rothenbekg was presently in Brooklyn or New York City; did he use public adjusters or 10-percenters in his practice; did he pay laymen to solicit cases for him; did he have control of the records, of the law firm of Cohen and Rothenberg (composed of the petitioner and said Rothenberg); did he pay individuals any money or moneys for sending cases to him; did he give advances to clients in the conduct of his practice as an attorney; and, did he in the conduct of his practice refer or send clients to doctors.

As may clearly be noted from the record, these questions did not involve petitioner's political beliefs or associations; they did, however, concern the manner in which petitioner practiced law, and involve possible breaches of the Canons of Ethics of the New York State Bar Association. It is to be noted that the Louis Rothenberg about whom petitioner was questioned was one Louis Rothenberg, an attorney, who had been indicted by a New York County Grand Jury on July 28, 1954 for violations of the so-called "ambulance-chasing" provisions of the Penal Law of the State

of New York (Sections 270-a and 270-d), and he pleaded guilty to one count of the said indictment, and was sentenced to prison on June 20, 1955 (R. 49). Petitioner was a law partner of said Rothenberg during part of the period covered by the indictment.

At this initial hearing in the preliminary investigation the rights of the petitioner were scrupulously safeguarded. In fact, at one point petitioner was given the opportunity to halt the hearings in order to consult privately with his counsel (R. 25). It patently appears from the record below that the questions asked petitioner were specific and well within the scope of the Court-authorized inquiry into the area of solicitation and improper handling of personal injury claims.

On May 19, 1959, the petitioner, in response to a subpoena ad testificandum and a subpoena duces tecum served apon him, appeared for the second time with counsel before the Judicial Inquiry in its preliminary investigation. Some six months and twenty-one days had elapsed since petitioner's first appearance, and he had many hours, days and months to deliberate over the position he had adopted, the oath he had taken when he was admitted to practice as an attorney, and his duty to the court that and admitted him some thirty-seven years previously, and his obligation to be open, frank, candid and straightforward with the court when it inquired into his professional conduct. Petitioner's attitude was the same as it had been more than six months before as is evidenced by the following portion of the record (R. 36):

"Q. During that period of time have you practiced law individually or at any time did you practice in association with or in partnership with any other lawyer, or lawyers? The Witness: May I consult with Mr. Price? (His counsel.)

The Court: Of course.

Mr. Price: Assert your privilege. It is my advice to you to assert your constitutional privilege.

The Court: You may consult with Mr. Price at any time during the questioning, in private or otherwise.

The Witness: Thank you.

The Court: Surely.

Mr. Price: I think, in order to expedite it, that I might indicate to him what I desire him to do. I just did.

[fol. 49] The Court: All right.

The Witness: I don't understand you,

Mr. Price: Assert your constitutional privilege.

The Witness: Acting upon the advice of my counsel, your Honor, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me, and may tend to expose me to a penalty or forfeiture, and I rely on the privileges accorded to me under the New York State and Federal Constitutions."

Counsel to the Inquiry advised petitioner and his counsel as follows (R. 33):

"I want you to feel completely free to confer at any stage of this interrogation with Mr. Price for such advice as you may wish to obtain from him, and similarly, Mr. Price, I don't want you to hesitate, if you feel at any appropriate time you ought to consult with your client on matters of law or constitutional questions, if any arise, without, of course, interrupting the interrogation proper, I want you, in turn, to feel completely free to confer with your client.

Mr. Price: I might say Judge Baker has very kindly advised me of my rights when I first appeared here with another lawyer, so I think I understand, and I think he understands my position."

And finally, before the questioning commenced, petitioner was told (R. 33):

"Is there any question, Mr. Cohen, that you should like to ask, or any statement you would like to make before proceeding with my questioning?

The Witness: I have no statement to make."

Thus, petitioner was familiar with the purposes of the inquiry, was informed he could make a statement, had his counsel at hand to consult with, and did consult with counsel as he wished. Then the questioning began at this second hearing. The questions, as an examination of the record indicates, were not directed to political associations or beliefs or to the defense of unpopular causes, rather they were addressed to petitioner's conduct of his professional practice insofar as it concerned personal injury claims.

Petitioner, at this second hearing, asserted the privilege against self-incrimination approximately 59 times in answer to questions addressed to his professional conduct for the years 1953-1958, for example: his association with other attorneys in the negligence field (R. 36) whether he used laymen to settle negligence cases for him (R. 48); the number of employees in his law office (R. 37); whether he paid police officers, hospital and/or prison employees for referring negligence cases to him (R. 44); whether he knew or had relationships with eight specific laymen (R. 45-47, 49) (Al Frangello, Tom Connolly, Albert Gaetani, Abe Kaplan, Clifford Bass, Antonio Pecorino, "Smitty", and

Patrick McCormick), and whether he employed so-called "runners" to solicit retainers of personal injury claims (R. 45).

Prior to the putting of the first question to the petitioner at this second hearing, the counsel to the Judicial Inquiry, Mr. Castaldi, questioned the petitioner as to whether he was aware of the purposes of the Judicial Inquiry and why he was summoned; and the petitioner stated concerning the order authorizing the Judicial Inquiry (R. 31): "I read it." And the petitioner's counsel, Mr. Price, a member of the Bar for over thirty years stated (R. 32):

"We will concede that my client is more or less, as are all lawyers, duty bound to know the scope of the Inquiry ordered by the Appellate Division, and I so concede it."

The record demonstrates that the petitioner had an intimate knowledge of the subject matter inquired into and that he availed himself of the privilege against self-incrimination after due deliberation in order to save himself from whatever consequences might flow from his answers, and not to protect any client's confidence or any freedom of political thought or association.

At one point at the second hearing the petitioner asserted that he had not examined some statements of retainer before the court, which formed the basis of certain questions, and the counsel for the Judicial Inquiry stated (R. 44):

"Q. Lest there be any questions as to opportunity to look over the statements of retainer, Mr. Cohen, I want to give you full opportunity to examine anything that you wish that is referred to here and made part of this record. In other words, I do not want, frankly, a qualified answer, and if you want that opportunity, I shall cooperate."

and petitioner replied (R. 44):

"No, my answer is the same as indicated, upon my attorney's advice."

The petitioner thus indicated he had no desire to request an adjournment in order to examine the exhibits in accordance with the opportunity afforded.

Apparently, whenever petitioner felt the particular question put would not hurt him, he answered it. For example, he answered questions directed to his personal bank account (R. 51-52), though he refused to answer questions directed to the partnership bank account of petitioner and the aforementioned convicted law partner of petitioner, Rothenberg (R. 52).

There was no effort made at either hearing to conceal anything from the petitioner. Questions were asked about specific cases handled by the petitioner, for example, the *McCormick* case (R. 50), in which petitioner filed a statement of retainer as required by rules of the Court, which bears said Rothenberg's name as the referrer of the client to petitioner, although Rothenberg was in jail at the time of the claimed referral (R. 48-49).

Before the second and last hearing in the preliminary investigation was closed, petitioner was warned as to the possible consequences of his act of asserting the privilege (R. 54-58). Petitioner was also informed that no inferences were being drawn from his assertion of his privilege against self-incrimination (R. 54).

The record below time and time again demonstrates the constant safeguarding of the rights of the petitioner. For

example, this Court itself in Anonymous 6 and 7 v. Baker, 360 U. S. 287 (1959), stated that a witness before the Judicial Inquiry in the preliminary investigation was not entitled to have counsel present in the hearing room with him. However, the petitioner, in the second and most important hearing, was accorded the privilege of having his counsel present with him. Petitioner's counsel stated that petitioner had received fair and lawyer-like treatment from the Inquiry (R. 59):

"Mr. Price: All right, sir. I want to say that I am very, very grateful to your Honor for your patience and your kindness and your courtesy, and I am sure my client is. And I am very thankful to you for your kindness and patience, Mr. Castaldi, and you, Mr. Caputo. I think we have all tried to act as lawyers."

We believe that a reading of this record below leads inevitably to the conclusion that petitioner was neither cooperative with the Judicial Inquiry nor candid in either of his appearances before said Inquiry.

# (c) Appellant was not denied due process by absence of an adversary-type hearing.

As to the petitioner's claim that he was not tried in an adversary manner before a Referee appointed by the court in a disciplinary proceeding, and thereby was deprived of due process, this argument can be disposed of promptly. It was by petitioner's own choice that no trial in the disciplinary proceeding was had, since petitioner raised no issue of fact in his answer to the disciplinary petition below. The petitioner in his answer admitted all the factual allegations and took issue only with the legal conclusion raised by the petition (in paragraph 23 thereof). Therefore, there was no question of fact to be determined by a Referee.

The determination of a disciplinary proceeding without appointment of a trial referee by the court is based upon precedent of long standing. As far back as 1906 in New York in the Matter of Nathaniel Cohen, 115 App. Div. 900 (1st Dept.) (1906) (Opinion withheld from publication, but made available to Co-ordinating Committee on Discipline by order of Appellate Division of Supreme Court, dated February 16, 1960), the Appellate Division of the Supreme Court of the State of New York, First Department, rendered its decision in a disciplinary proceeding without ordering a reference. As stated by Presiding Judge O'Brien, in the first paragraph of his opinion for the court in that case:

"Upon this application to disbar the respondent, Nathaniel Cohen, we have reached the conclusion that as the facts are undisputed, we should dispose of the question presented without a reference."

These rights to confront one's accusers, cross-examine witnesses and call witnesses on one's own behalf arise only in an adversary proceeding such as is had before a Referee who is appointed, where an issue of fact is raised in a disciplinary proceeding, to hear and report whether the evidence adduced before him sustains the charges in the petition.

It is important to bear in mind at all times the distinction in the procedures long prevailing in the State of New York under Section 90 of its Judiciary Law between (a) the preliminary inquiry which is always non-adversary (see People ex rel. Karlin v. Culkin, 248 N. Y. 465 (1928)), and (b) the disciplinary proceeding which is of the adversary-type, except in those instances where the answer of the attorney charged raises no issue of fact to be tried.

In this case no issue of fact was raised by the answer, which admitted all the factual allegations of the petition.

No appointment of a Referee was necessary since there was no disputed issue of fact upon which he might hear evidence and report with his opinion. It is, therefore, erroneous to refer in this case to the right of petitioner in a disciplinary proceeding to confront his accusers, cross-examine witnesses and call witnesses of his own, since no such rights exist in the preliminary investigation, and a hearing before a Referee in which such rights arise never came into existence by reason of the petitioner's own act in admitting the factual allegations of the petition.

(d) Petitioner's unwillingness to co-operate with the Judicial Inquiry of the court that admitted him was ample ground for disciplinary action, which was not arbitrarily imposed.

Can a state court not protect its dignity and the processes of administration of justice, particularly through proper exercise of its power of licensing attorneys and insistence upon adequate standards of continuing fitness to practice? Can a state court not carry out its responsibility in this area to the public? The disbarment of the ... petitioner was not by way of punishment for availing himself of the privilege against self-inerimination; rather it was motivated by the necessity of protecting the public by eliminating those unworthy of trust by reason of their refusal to co-operate with the court. The proceedings in the court below had nothing to do with grand jury proceedings, criminal trials or waivers of immunity; they had to do with an inquiry by the court itself into the continuing fitness of one of its officers, particularly as to the manner in which he conducted his practice in the handling of personal injury claims. As the Court below stated in disposing of the cases cited by petitioner, which dealt with grand jury proceedings, criminal trials and waivers of impunity, at (R. 87):

"Appellant's reliance is on Matter of Grae (282 N. Y. 428, supra); Matter of Ellis (282 N. Y. 435, supra); Matter of Solovei (276 N. Y. 647) and Matter of Kaffenburgh (188 N. Y. 49). None of those decisions controls us here. The precise question in Grae and Ellis (supra) was as to whether a lawyer who offered to answer all pertinent [fol. 119] questions could be compelled in such an investigation to waive immunity in advance of questioning. The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or reexamination) of the question now directly presented. Likewise as .to . Kaffenburgh and Solovei (supra): Kaffenburgh's refusal to testify was at a criminal trial (so in Matter of Cohen, 115 App. Div. 900) and Solovei's was before a grand jury. Our present appellant by declining to answer may have escaped criminal prosecution and punishment, but he could never, while a member of the Bar, escape the other consequences of his flagrant breach of his absolute duty to the court whose officer he was. That breach was in itself 'professional delinquency' (Ex parte Garland, 71 U.S. 333, 379) and a valid reason for depriving appellant. of his office as attorney."

And the court's opinion below is also dispositive of petitioner's citation of the case of *Grunewald* v. *United States*, 353 U. S. 391, 1 L. ed. 2d 931 (1957), in which case was discussed the assertion of the privilege against self-incrimination in a grand jury proceeding.

Significantly, in not one of these cases cited by petitioner did the attorney when called upon to do so refuse to answer the questions of the Court when it inquired into his fitness to practice.

The Judicial Inquiry in this case was not an inquiry into unorthodox political beliefs, it was an inquiry into petitioner's solicitation of personal injury claims and the public disrepute such activity brings the Bar of the State of New York and the resultant deleterious effects of such unethical conduct on the Bar.

This Court has time and time again upheld the power of the Court to protect its dignity. As stated by Mr. Justice Frankfurter in the previously cited *Theard* case, at page 281:

"The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court... The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do."

### (e) Decisions of this Court in the Konigsberg, Anastaplo, and Schware cases are not controlling here.

The facts in Konigsberg v. State Bar of California, 353 U. S. 252, 1 L. ed. 810, 77 S. Ct. 722 (1957), and In re Anastaplo, 18 Ill. 2d 182, 163 N. E. 2d 429 (1959) presently before this Court on appeal and the facts in Schware v. Board of Bar Examiners, cited supra, previously decided by this Court, have no relationship to the facts in this case, and any decisions made by this Court regarding those cases should not be determinative of the issue in this case.

The petitioner here, with no substantial defense at hand in a case involving a lawyer's duty to account for his professional conduct, attempts to place himself under the protective cloak of such cases as Konigsberg, Anastaplo and . Schware, all cited supra. The facts, however, in the petitioner's case are not similar to Konigsberg, Anastaplo and Schware, which deal with political beliefs, political associations, and the defense of unpopular causes and people, while petitioner's case deals with (R. 19) "... alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers . . . " as well as " . . . any other practice involving professional misconduct, fraud, deceit, corruption . . . " Konigsberg, Anastaplo and Schware deal with alleged arbitrary refusals of admission to the Bar while petitioner's case deals with a Judicial Inquiry, not arbitrarily conducted, into petitioner's continued fitness to practice in view of his lack of candor with the Court as regards the subject of improper handling of personal injury claims. Significantly a search of the records in the Konigsberg, Anastaplo and Schware cases indicates that none of the petitioners in those cases took the privilege against self-incrimination.

Freedom of political association is a particularly sensitive area, which in our history, since the days of the founding fathers, has been placed under the umbrella of federal constitutional protection, and rightly so. Petitioner, understandably, is desirous of trying to get under that protective umbrella, notwithstanding several fatally defective omissions in the factual record below: first, this case involves no question of freedom of political association (as do Konigsberg, Anastaplo and Schware); and second, there was due process in all the procedures taken below, which appears crystal clear from the record, in spite of petitioner's claims that he was "threatened" with undisclosed information of professional misconduct. Petitioner was not "threatened" in any way in his two appearances before the court in the preliminary inquiry below. Numerous references to that effect in the brief filed here by petitioner's counsel are without support in the record of the proceedings below.

(This particular claim is here made for the first time, and was not made below.)

Finally, it is clear that this cause of the petitioner involves neither the vitality nor independence of the American bar. No lawyer will be heard to suggest seriously that the price of "fearless advocacy" is a constitutionally protected right to solicit personal injury claims, "chase ambulances," bribe police officers and ambulance attendants, breach the Canons of Ethics and violate the Penal Law of the State of New York, free from disciplinary limits or supervision.

# Summary

New York has held in this case that all constitutional privileges inure to the benefit of lawyer and layman alike, and that no rights guaranteed to the lawyer as a citizen may be denied him because he is a lawyer, but that a lawyer may forfeit his privilege to practice law if, as in this case, he fails to account for his conduct as an attorney-at-law and an officer of the court to a Judicial Inquiry ordered by the Court to investigate the conduct of attorneys in a field of law practice fraught with abuses. There is nothing arbitrary in such a holding by a State court.

The petitioner was not threatened, he was not faced by evidence given by unknown accusers, the subject matter of the Inquiry was not kept secret from him. The preliminary inquiry in which the petitioner appeared was not that of a grand jury, or a criminal trial; rather it was the Court itself inquiring into his continuing fitness to be a member of the Bar and an officer of the Court. This Court itself has described attorneys as officers of the Court. See Theard v. United States, previously cited. As Judge Cardozo said in the Matter of Rouss, 221 N. Y. 81 (1917), cert. denied 246 U. S. 661 (1918), at pages 84 and 85:

"Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards (Selling v. Radford, 243 U. S. 46; Matter of Durant, 80 Conn. 140, 147). Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, · like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of a crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment."

No one can successfully urge that a lawyer's obligation to his profession does not include a duty of frankness, straightforwardness and candor to the courts at all times, and, in particular, when the court is inquiring into the professional conduct of its own officer for the purposes of determining his continuing fitness to exercise the privilege to practice which the court alone granted to him. As stated by Sharswood, in *Professional Ethics* (1854), pages 168, 169:

"No man can ever be a truly great lawyer, who is not in every sense of the word, a good man. . . There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things we hold dearest on earth—our fortunes, reputations, domestic peace, the future of

those dearest to us, nay, liberty and life itself, we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a stain, but without suspicion. From the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity and candor: they are the cardinal virtues of a lawyer."

When a court addresses to a lawyer some sixty specific questions, all of which are concerned with the conduct of his professional practice and impinge squarely on the issue of his continuing fitness to exercise his license, his refusal to answer, notwithstanding his conceded constitutional right to do so, indicates an election to defy the historic power of the court so to inquire. No lawyer may thus set himself above the authority of the court. No lawyer may say, in effect, to the court that admitted him; "You may not compel me to account for my professional conduct in a properly constituted Judicial Inquiry." This attitude is not consistent with the high duty a lawyer owes to the court as its officer. By his own choice, he places himself in a position where he is unworthy of the trust of the court and the public.

There are important legal issues involved in this appeal, but underlying them, and of infinitely greater importance, are the moral issues involved, namely, what standards of professional conduct shall prevail with respect to lawyers generally, and whether the high duty to answer with respect to one's professional conduct in the circumstances in this case is to be avoided without consequence as to professional status, by use of the conceded right to take the privilege against self-incrimination. If the petitioner in this case is right in his contention, then the respect and confidence in which the Bar is held by the public is headed downward at a precipitous rate and no man knows the ultimate depth of that decline.

As Chief Judge Cardozo wrote in the landmark opinion in the Karlin case (cited supra) page 480, that

"If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."

The question is: Were these words mere rhetoric from the pen of a juridical scholar, entombed in a case report gathering dust upon the shelves, or are they to become a reality by being implemented and revitalized by a current court decision! The highest court of record in the State of New York has now given its answer in a vigorous and cogently reasoned decision. No valid ground has been urged for disturbing it.

#### CONCLUSION

This appeal should be dismissed for lack of a substantial federal question, or the judgment of the court below should be affirmed.

Dated: September 15, 1960.

Respectfully submitted,

HENRY WEINER,

Attorney for David W. Peck, Jacob Burns and Harry Lesser, as members of the Co-ordinating Committee on Discipline created by the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association

ALLEN HARRIS
DANIEL J. McMahon
With him on the brief

#### APPENDIX I

New York Law Journal—December 3rd and 4th, 1959 Work of the Co-ordinating Committee on Discipline

## By JACOB BURNS

[The accompanying article is the text, in greater part, of an address delivered at the recent forum of the New York Comity Lawyers' Association. Mr. Burns is chairman of the Association's Committee on Discipline and a member of the Co-ordinating Committee on Discipline.—Editor.]

The Co-ordinating Committee on Discipline was created in October, 1958, as a joint effort on the part of and pursuant to a plan adopted by the Appellate Division in the First Judicial Department, the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association for the purpose of continuously surveying and investigating practices of attorneys and others in the handling of personal injury claims.

In the past, large scale publicized judicial inquiries into and investigations of the unethical practices of attorneys in soliciting and securing retainers in personal injury cases have been conducted sporadically every ten or fifteen years. Such investigations, however, have not effectively prevented a resumption of these practices after the clamor of the investigations has subsided. The publicity attendant upon such investigations which usually involve but a few unscrupulous lawyers leaves in the minds of the public an unwarranted feeling that the unethical practices disclosed permeate throughout a large sector of the members of the Bar. The impression thus given is not a fair reflection of the conduct of the Bar. For these reasons it was determined that the Bar and the public would be better served if

a permanent organization were set up whose function it would be to survey continuously the practices of attorneys in the negligence field and conduct investigations thereof. Thus, in addition to initiating disciplinary actions on specific charges against those who the committee believes have been guilty of professional misconduct, the mere fact that such a committee is constantly at work would in and by itself have a preventive and prophylactic effect.

To implement the work of this committee, the justices of the Appellate Division on December 15, 1958 amended Rule V of the special rules regulating the conduct of attorneys giving the Co-ordinating Committee on Discipline the rightto secure subpoenas in conducting preliminary investigations of professional misconduct and empowering it to take and transcribe the evidence of witnesses who may be sworn by any person authorized by law to administer oaths. These subpoenas may issue for the attendance of witnesses as well as for the production of books and papers before the committee.

The plan, which was the basis of the formation of the Co-ordinating Committee on Discipline, provides that this committee shall be composed of the chairman of the Grievance Committee of the Association of the Bar of the City of New York, the chairman of the Committee on Discipline of the New York County Lawyers' Association and the chairman of the Grievance Committee of the Bronx County Bar Association. Thus the committee is presently composed of former Presiding Justice David W. Peck, who is its chairman, representing the Association of the Bar of the City of New York; Joseph A. Brust, representing the Bronx County Bar Association, and myself representing the New York County Lawyers' Association. The plan also provides that the operation of the plan and the work of the committee shall be conducted under the overall supervision of the Presiding Justice of the Appellate Division. The aid

and co-operation which this committee has received from its very inception and continues to receive from the Presiding Justice Bernard Botein has been most invaluable, and his interest in the work of the committee has contributed in great measure to the fulfillment of the tasks undertaken by it.

On February 3, 1959, pursuant to the provisions of section 90 of the Judiciary Law of the State of New York and in the exercise of the inherent powers of the Appellate Division, the justices of that court authorized and directed the Co-ordinating Committee on Discipline to conduct a continuous study and investigation of the practices of attorneys and others in the negligence field.

The headquarters of this committee are located at the Appellate Division Courthouse, at Twenty-fifth Street and

Madison Avenue, in Manhattan. .

When this work first started, the committee had but a general idea of the scope and extent of abuses which exist in the negligence field here, but as we delved into matters and gathered information from various sources available to us it soon became apparent that we had a job on our hands of no small proportions, although the percentage of attorneys involved, compared to the total number practicing here, is very small.

We now have three paid attorneys on our staff devoting their full time to this work, which often includes Saturdays and Sundays. We were very fortunate to obtain as our chief counsel Henry Weiner, who in the past has been in public service and whose ability, temperament and high regard for the dignity of our profession makes him an invaluable member of our staff and one in whom the members of the Bar can have confidence, and one who is possessed of a deep sense of fair play.

Mr. Weiner is assisted by attorneys Daniel J. McMahon and Allen Harris. Mr. McMahon has also in the past been in public service and in investigative work, while Mr. Harris recently resigned his position as assistant district attorney in the frauds bureau in New York County to take the post with the legal staff of the committee.

We also have a number of full-time investigators, clerks and other office personnel, and at hearings we engage the services of official court reporters.

Although this committee actually started its work only in February of this year, we have learned a lot and have done much in this short space of time. It has not been very pleasant to learn the things we learned, and it is equally not very pleasant to have to do the things we must.

Now what have we learned? I can but briefly refer here to a few of the highlights.

- 1. One of our tasks is continuously to examine, survey and study statements of retainer and closing statements required to be filed by attorneys pursuant to the rules of our Appellate Division relating to the conduct of attorneys. In this connection we have found the following:
- (a) A number of attorneys have not bothered to file either statement in many of their cases.

When we confronted these attorneys with this fact they readily admitted their dereliction, but tried to explain it away in various ways. Some said it must have been overlooked by their secretaries, and some have said that a number of the cases have been dropped by them after investigation, and in those cases they have not filed statements of retainer. Now, what did they do in these latter cases: They usually first obtained a retainer from the client, then determined the name of the insurance company covering the claim, got the police and hospital record, if any, wrote for the copy of the motor vehicle report, if it was an automobile accident, tried to get a medical report, and often wrote a claim letter to the prospective defendant. After handling, and sometime mishandling, the case for thirty,

sixty or ninety days or more, if they decide that the insurance company is one of the "tough" ones, or that the liability is hard to prove, or that for some other reason the case is not likely to be settled quickly and without difficulty—they give the case back to the client. Is an attorney in such a situation or in comparable situations relieved of the obligation to file statements of retainer! I am sure that all will agree that he is not.

What hurts even more in such a situation is that the unfortunate client's case has lost much or all of its value, because the client will probably decide to drop the matter, or, if he does not would he not have a very difficult time finding another lawyer who would want to pick it up from there!

Some attorneys have attempted to justify their failure to file statements of retainer on the ground that there was no written retainer. A retainer need not be in writing. When an attorney undertakes to represent a client in a negligence case on an understanding, actual or implied, that his fee, if any, would be contingent upon a successful conclusion or disposition of the case, he should file a statement of retainer within the time required, even though the actual amount of or percentage of the contingent fee is not then agreed upon.

(b) In those cases with respect to which attorneys have not filed statements of retainer, they invariably also fail to file closing statements after the cases are settled. But in the few cases where attorneys have filed a closing statement, but not a corresponding statement of retainer, when the matter was called to their attention by the clerk of the Appellate Division, their explanations were that at the outset they were not planning to charge a fee, but after the case was settled there was a change of heart, or the client insisted on paying a fee. No one is deluded with such contentions.

(c) Attorneys are required to indicate in their statements of retainer whether or not the client was previously known to the attorney, or to give the name and address of the person referring the client to the attorney or of anyone who had any connection with such referral, and to state such connection. This requirement applies only where the attorney was retained or associated in any way in five or more personal injury or property damage claims in the previous calendar year.

Some firms of attorneys who think they can get around this requirement will file some statements of retainer in the individual names of their associates or partners to break up the total number of cases so that no one of them has five or more cases a year. This method of attempting to get around the rule is really not very effective.

When it comes to mentioning on the statement of retainer the names and addresses of persons who referred the clients to the attorney, this is what is often found:

If it is a doctor, his designation of "Dr." is left off.

If this doctor refers a number of cases to the attorney, the doctor's address is sometimes given as his office address, and other times as his home address.

If it is an insurance broker, his home and not his business address is usually given.

If it is an owner or employee of an automobile repair shop, his home address is usually given.

None of these variations really fools anybody, but they don't sit well with the committee. Straightforwardness is the best policy.

(d) Testimony of attorneys who specialize in adjusting or settling accident cases for other attorneys, and who work on a contingent fee basis (averaging between 5 and 10 per cent. of the gross settlement) reveals that these attorneys in the main do not file statements of retainer nor closing statements on such cases.

My interpretation of Rule IV-A is that every attorney who is to receive compensation on a contingent fee basis in a personal injury case is required to file a statement of retainer, and that would seem to include attorney-adjusters.

There certainly is no question of their obligation to file closing statements, because the provision of subsection (d) of Rule 4 specifically sets forth that:

Every attorney, upon receiving, retaining or sharing any sum as contingent compensation in any claim or action subject to this rule, \* \* within fifteen days after such receipt, retention or sharing shall serve in the manner required by Rule 4B on the client and file in the Office of the Clerk of the Appellate Division, a closing statement \* \* \*.

Since Rule 4 permits the serving and filing of joint closing statements where more than one attorney receives, retains or shares in the contingent compensation, it would permit the attorney-adjuster to comply with this rule by joining in the execution of the closing statement prepared by the attorney of record.

Where an attorney engages the services of an attorney-adjuster to assist in the settlement of a case, and then pays the latter a fee out of the total fee charged the client, and does not reveal that fact and the amount of such payment in the closing statement, he, the original attorney, has not full complied with the rule, which, among other things, requires the itemization of any amounts paid by the attorney to others, listing their names and addresses.

(2) With respect to Rule IV-F of the special rules relating to the conduct of attorneys, it was found that some attorneys either do not know of the existence of this rule or they are deliberately ignoring it. This rule requires attorneys in personal injury or property damage cases to "preserve the pleadings and other papers pertaining to

such claims and causes of action and memoranda of the disposition thereof for the period of at least five years after any settlement or satisfaction of the claim or action or judgment thereon, or after the dismissal or discontinuance of any action brought."

In several situations investigated, we found attorneys. for the claimants stripping their files soon after a case is settled to the point where there is practically nothing in the files except, possibly, a copy of the release and some memoranda as to the disposition of the case, and very meager pleadings, if any.

The fact that the fifes take up a good deal of room is no

excuse.

Failure to preserve the required records may impede investigation in a particular case, but in the final analysis it does not really work to the advantage of the attorney who destroys records for reasons sufficient unto himself. .

(3) We have looked into the matter of the activities of so-called "lay" adjusters. Based on our investigations we find that these are persons who, in many cases, have over the years established contacts with insurance companies, and have built up considerable experience in negotiating settlements, as intermediaries between the attorney for the claimant and the insurance company. They are usually engaged by the attorney on a contingent fee basis and receive from the attorney out of his fee approximately 5 to 10 per cent. of the amount of the gross settlement.

There are to-day not many of these gentlemen remaining in business.

This practice in effect, constitutes the splitting of fees between an attorney and a lay person, which is in violation of canon 34 of the Canons of Professional Ethics of the American Bar Association and of the New York State Bar Association, which provides that:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

Further when a lay adjuster negotiates with an insurance company the settlement of a pending claim or action for damages for personal injuries he usually discusses with insurance company representatives questions of legal liability involved in the claim or action, and he thereby in effect practices law, which is prohibited to persons other than those duly admitted to practice law.

Also, in an early opinion of the New York County Lawyers' Association's committee on professional ethics condemning the practice of lawyers dividing fees with lay adjusters, that committee went on to say:

It is, of course, fundamental that the lawyer cannot with propriety employ anyone to use personal influence based merely upon acquaintance or other contacts, as distinguished from services of constructive character free from such influence.

(4) With respect to the matter of disbursements and expenses of litigation:

Canon 42 of the Canons of Professional Ethics of the American Bar Association and of the New York State Bar Association provides that:

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

In the field of negligence we find that this canon is constantly ignored. It is common practice for lawyers in personal injury cases to make all disbursements and pay all expenses of litigation without any expectation or require-

ment of being reimbursed in the event there is no recovery; in many cases where there is recovery the lawyer absorbs the disbursements and expenses.

This practice is tantamount to the financing of lawsuits by lawyers. In some cases lawyers actually advance moneys to injured clients, at or shortly after retainer, and although they may consider such advances as loans and may take promissory notes therefor, one cannot escape the conclusion that such practices often constitute part and parcel of the ambulance chasing pattern. Lawyers should not become joint venturers in law suits.

In an opinion of the committee on professional ethics of the Association of the Bar, it is stated that "In his own profession the lawyer, is a counselor and an advocate; he must be neither a banker nor an insurer."

As to doctors' bills it is one thing for an attorney to advance the cost of engaging an expert for an examination and report, with the view of having the expert testify at trial, but it is entirely improper for an attorney to pay the treating doctors' bills.

Our investigations revealed many instances of attorneys sending clients to favored doctors for treatment, often when a client says that he was merely shaken up. For a pain in the shoulder or back or elsewhere, whether the pain is real or imaginary, the doctor will give diathermy or heat treatments, and will have the patient make a half dozen or more visits. He doesn't ask the patient to pay for these visits. But the lawyer gets a report and a substantial bill in the name of the client. Eventually, if the case is settled, the lawyer pays the doctor's bill out of his fee, and more often than not the payment is considerably less than the amount of the bill, and sometimes it is even made in cash. The client gets his full share of the settlement funds. The closing statement, where one is filed, does not reveal the payment to the doctor, it seems to get lost in thin air.

But even worse than that is this illustration of the kind of thing that has gone on:

A client comes to the lawyer's office after being involved in a minor accident. He says he was shaken up. No doctor or ambulance was summoned to the scene, and the client did not seek any medical treatment, but rather continued about his business and lost no time from work. The attorney sends the client to a doctor friend. The doctor writes a comprehensive report indicating extensive injuries to the patient, making it appear the patient underwent extensive treatment. The doctor's report reads something like this:

- (1) Whiplash injury to the neck and cervical spine.
- (2) Contusions and abrasions of right shoulder.
- (3) Ecchymosis and edema of the right knee.
- (4) Bursitis of the right shoulder.
- (5) Sprain of back in the lumbo-sacral area.

Total medical bill, \$132.

For the treatment of all these "serious" injuries the client visited the doctor just once, perhaps for fifteen minutes or less.

And we have turned up situations like the illustration just given where the client never even saw the doctor who made the report and rendered the bill.

In a number of cases investigated, we found that the attorney who is usually present when a physical examination of his client by the insurance doctor takes place will say to the doctor that "X-rays were negative for fracture." This presupposes and constitutes a representation that X-rays were actually taken, when, in fact, the testimony of the claimants in many such cases before the committee disclosed that no X-rays were taken.

Instances have been found where the same client had two or three automobile accidents over a period of three or, four years. The insurance companies in the later accidents received the identical doctor's report and/or auto repair estimate used in the first accident. There is one thing that can be said for this procedure, it saves time, effort and money, but perhaps there were other reasons.

(5) Another facet in the general pattern indulged in by a small group of lawyers in presenting claims to insurance companies is one having to do with the claim of loss of earnings of the injuried client.

To obtain a proper offer of settlement the lawyer feels he must show not only a good sized medical bill, but also that the client lost time from his employment and was not paid his salary during such absence. It appears important to show sizeable special damages, also because many insurance company adjusters have developed a formula for a quick evaluation of a case by taking the total special damages claimed and multiplying it by three, four or five, or some such number.

In many minor accidents there is no loss of time from employment. However, some have found a way to correct this "deficiency" in the claim.

It's no problem to get a few letterheads from a friend in business. A statement is typed up on the letterhead that the client is employed by that firm in some capacity, and that he lost several weeks time and wages due to a certain accident. When we question the client, he knows nothing about it, since he never worked for that firm. We subpoena the alleged' employer and his payroll records, and it is readily admitted that the client never worked for that firm, and the employer asserts he never wrote the letter and doesn't know how the letterheads were obtained. The lawyer says he got the letter from the client. It becomes quite a mystery.

Then there is the loss of earnings letter written on the stationery of a firm of which the injured party is an owner or partner. He draws \$200 or more a week from the business and did not lose any pay, because he gets paid whether he works or not. But the letter says he is employed as a clerk at \$75 per week and lost four weeks' time and pay. This has a bit of a different twist to it, because it tends to minimize the special damages rather than magnify them. But there is a purpose to this madness.

We even found situations where the alleged employer

firms were non-existent.

It is just as improper to prepare a bill of particulars containing false statements as to the extent of injuries, medical expenses and loss of earnings, even though the bill of particulars is signed by the client. We find that clients usually will sign any document which the attorney asks them to sign.

(6) We have found a number of situations where attorneys resort to improper procedures in effecting settlements of infants' claims.

One type of undesirable practice is that of settling infants' claims without obtaining a compromise order, where the amount of settlement is small. No doubt there is considerable expense and trouble in getting a doctor's report, preparing affidavits and the order, and taking the time to appear before a judge with the infant in a two or three hundred dollar settlement; but the existing law requires this procedure for the infant's protection, and lawyers should not take it upon themselves to change the law, even though some insurance companies co-operate by accepting a general release from the infant's parent. Besides, the attorney takes the unnecessary risk of being held esponsible should the injuries later develop to be more serious than at first believed.

(7) The matters which have been touched upon are those varieties of abuses in the negligence field which were found to exist with some regularity among a limited number of attorneys investigated. There are, however, other specific instances of professional misconduct, disclosed by the investigations, which are presently under scrutiny and which differ from those which have been mentioned. It would be unwise for me to give details of these at this time. It is believed, however, that only a few lawyers are involved.

Also, we are presently looking into evidence of alleged large scale "chasing" of serious accident cases—and because the investigation is still pending details cannot be given at this time of the devious methods and schemes allegedly applied in this despicable business.

(8) When the committee requests a lawyer to appear before it, there is no implication necessarily to be made therefrom that he is being charged with any impropriety. The effectiveness of our work depends on information. We may learn a fact from one source, and we may believe that a particular lawyer can be of help in furnishing us with other pertinent data. Our work entails not only seeking out wrong-doing, but also preventing it from occurring. One phase of our work requires us to ascertain present practices and to recommend to the Appellate Division in what respects amendments to rules, or new rules, can improve the practices or eliminate undesirable practices.

We need the co-operation of those we call on. We may not get it at all times. It only means that we have to work a little harder, a little longer. We have a lot of patience; also we have determination.

We are not interested in proving crimes against anybody. That is not our function. We are merely required to seek out the "bad eggs" in our profession and call them to the attention of the Appellate Division. The smell of one. bad egg in a basket can give the erroneous impression that the whole lot is no good.

The members of the Bar who specialize in negligence practice must bear in mind that widespread abuses in the field of automobile accident claims tend to increase insurance premiums, and, if the situation continues, public in; dignation may eventually force legislation which would take these claims out of the hands of the courts and, for all practical purposes, out of the hands of lawyers, and make every vehicular accidental injury compensable, regardless of negligence, through a determination by a board or commission comparable to the manner in which workmen's compensation cases are handled. Is this what the negligence Bar wants! I think not.

We need to uphold the dignity of our profession. We must nurture and maintain public reliance on the integrity of the legal profession. Some lawyers believe that their first duty is to the client. I do not believe this is so. I think that a lawyer's first duty is to the courts of which he is an officer; his second duty is to his profession whose integrity and dignity he must always maintain; his third duty is to his own self-respect as a member of the Bar; and then comes the duty to protect the best interests of his client and that only by honest and sincere effort.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 84

IN THE MATTER

ALBERT MARTIN COHEN,

Petitiener.

DENIS M. HURLEY,

Respondent:

ON WRIT OF CERTIFORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE.

## BRIEF FOR RESPONDENT

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# Supreme Court of the Anited States

OCTOBER TERM, 1960

No. 84

IN THE MATTER.

of

ALBERT MARTIN COHEN,

Petitioner.

DENIS M. HUBLEY.

Respondent.

# BRIEF FOR RESPONDENT

Petitioner, Albert Martin Cohen, a New York attorney, by writ of certiorari granted by this Court, has been allowed review of an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, disbarring him from the practice of law for professional misconduct. The Court of Appeals of New York affirmed the order of disbarment. The misconduct found was that Cohen hindered and impeded a judicial inquiry that had been ordered by the Appellate Division (a) by refusing to answer questions concerning his professional conduct, which were relevant to the inquiry and (b) by refusing to produce relevant records set forth in a subpoena duces tecum served upon him.

#### Statement

Since petitioner claims that New York acted arbitrarily in disciplining him, a statement of the essential facts and the procedure followed is in order.

The genesis of this proceeding is a judicial inquiry undertaken by direction of the Appellate Division; Second Department. Advised by the Brooklyn Bar Association's petition (presented after its own investigation) of serious abuses and unethical practices by attorneys in Kings County with respect to their procurement of negligence cases on a contingent basis and with respect to their prosecution of such cases, the Appellate Division in the exercise of its inherent and statutory power and duty (N. Y. Const., Art. VI, Sec. 2; Judiciary Law, Sec. 90; People ex rel. Karlin v. Culkin, 248 N. Y. 465), ordered a judicial inquiry.

The inquiry was ordered with respect to the alleged illegal, corrupt and unethical practices and with respect to the alleged conduct prejudicial to the administration of justice by attorneys and others acting in concert with them, in Kings County. The purpose of the inquiry is to expose . all these evil practices with a view to enabling the Appellate Division, to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them. (For a more complete discussion of the origin of the inquiry, its breadth and scope, see Brief for Appellee, pages 3-., Anonymous v. Baker, 360 U. S. 287. This Court has already had occasion to consider the work and problems of this judicial inquiry on four other occasions: Anonymous v. Baker, supra; Anonymous No. 14 v. Arkwright, cert. den., 359 U.S. 1009; Anonymous Nos. 16 and 17 v. Arkwright, cert. den., 359 U.S. 1009; Anonymous (No. 1) v. Hart, cert. den., 359 U. S. 953. For that reason

The County of Kings of the State of New York and the Borough of Brooklyn of the City of New York are co-terminus.

no further statement of the purpose or scope of the inquiry is here required.)\*

Rule 3 of the Special Rules Regulating the Conduct of Attorneys promulgated by the Appellate Division, Second Department, provides that an attorney who enters into contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file statements as to such agreements with the court and, if he enters into five or more such agreements in any year, he must give to the court in writing certain particulars as to how he came to be retained. This Rule was adopted as the result of previous judicial inquiries.

During the period 1954 to 1958, inclusive, pursuant to the provisions of said Rule, petitioner, a specialist in negligence cases, filed 228 statements as to retainer in his own name. In addition, 76 such statements were filed in the firm name of Cohen & Rothenberg, thus indicating that petitioner and his law firm had been retained on a contingent basis in a total of 304 negligence cases in five years (R. 33-35). The inquiry therefore deemed it advisable to call petitioner as one of its witnesses.

# Petitioner's Testimony at the Additional Special Term.

Petitioner was duly subpoenaed to testify and to produce his records with respect to such cases before the Justice designated by the Appellate Division to conduct and pre-

<sup>\*</sup>A public report of the inquiry's findings shows that serious abuses and unethical practices abound in the negligence field in Kings County (N.Y.L.J., June 23, 1958, p. 1; pertinent excerpts of this report are found in Appendix C of appellee's brief in Anonymous v. Baker, 360 U. S. 287). A similar investigation in two other counties in New York City revealed an equally sordid picture (N.Y.L.J., December 3 and 4, 1959, editorial page; this report is appendix I of the brief amicus curiae in the instant proceeding submitted by the Co-ordinating Committee on Discipline).

side at the inquiry at an Additional Special Term of the Supreme Court of the State of New York, Kings County.

Petitioner appeared before the inquiry on two separate occasions, that is, on October 28, 1958 and on May 19, 1959 (R. 22; 28). On both occasions he was represented by counsel (R. 22; 28). In his discretion, the Justice presiding permitted petitioner full representation by counsel at all stages of the proceeding (see Anonymous v. Baker, 360 U. S. 287 at p. 292). Counsel for the inquiry explained the nature of and authority for the inquiry (R. 23; 31-32). Petitioner and he attorney were informed by the inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see Anonymous v. Baker, 360 U. S. 287, 291; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 479), that there were no respondents or defendants (R. 20; 43), that petitioner was "not being charged with anything" but was to be questioned as to pertinent facts "within the scope of the Inquiry" and which were thought to "bear on or relate to your professional conduct." and also that counsel for the inquiry had "information that indicates your participation in professional misconduct" (R. 32-33).

Counsel for the inquiry then put into evidence the 304 "Statements of Retainer" filed by petitioner and the firm of Cohen & Rothenberg during the years 1954 through 1958 (R. 33-35). Counsel for the inquiry informed petitioner and the court that all these retainer statements were offered in evidence "as a basis for some of the questions to follow" (R. 33). Actually, the record discloses that practically every question asked petitioner had its basis in his own Statements filed with the court.

Petitioner answered a few preliminary questions as to how long and where he had practiced law (R. 22-23, 35-36). About sixty (60) other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel, he refused to answer any of them, except questions as to whether he had

failed in any case to comply with Special Rule 3 (R. 43), whether he was familiar with a rule requiring an attorney to maintain records of negligence cases for a stated period of time (R. 42), and whether he maintained a separate office bank account (R. 51).

He stated, as his ground for refusing to answer that "my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture" (R. 23 et seq.; 36 et seq.). On one occasion he added "and I rely on the privileges accorded me under the New York State and Federal Constitutions" (R. 36; and see R. 38).

The unanswered questions related to the identity of his law office partners, associates and employees (R. 24, 36); to his possession of the records of the cases described in his Statements of Retainer (R. 39-40); to any destruction of such records (R. 41); to his bank accounts (R. 40); to his paying police officers (R. 44), court or prison employees (R. 44), or others (specifically mentioned by name) for referring claims to him (R. 45); to his paying insurance-company employees for referring cases to him (R. 45); and to his promising to pay any "lay person" ten percent of recoveries or settlements (R. 61).

Petitioner was further asked—and refused to answer—whether he had made or agreed to make such payments to any of several named persons (R. 45-47); whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies (R. 48); whether his partner Rothenberg had been indicted for and had pleaded guilty to violations of Sections 270-a and 270-d of the New York State Penal Law which forbid solicitation of legal business or the employment by lawyers of such solicitors (R. 49-50); and whether he had knowledge of the claim of a named client who had been referred to him by Rothenberg (R. 50-51).

The particular client named was Patrick McCormack, by occupation a guard in the city prison. Petitioner's

Statement of Retainer (R. 48-49; see appendix) shows that petitioner was retained by McCormack on September 14, 1955 in connection with an injury sustained on August 19, 1955. The Statement of Retainer shows that McCormack was referred to petitioner by his law partner Rothenberg. Rothenberg was in jail for "ambulance chasing" at the time of McCormack's injury. He was also in prison at the time he referred the prison guard to petitioner (R. 49).

At one stage of the questioning, counsel for the Inquiry pointedly called to petitioner's attention Section 90 of the Judiciary Law which gives the appellate divisions exclusive and plenary power and control over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice (R. 54). At that time the Inquiry's counsel cited Canon 22 of the Canons of Professional Ethics requiring lawyers to be candid and frank when before the court; Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof; Canon 34 outlawing division of fees except with other lawyers; also Sections 270-a, 270-b, 270-c, 270-d and 276 of the New York State Penal Law, all relating to soliciting and fee-splitting (R. 34-56).

Counsel for the Inquiry warned petitioner and his counsel that "serious consequences" might flow from refusal to answer, albeit he invoked his constitutional privilege (R. 54).

Recently the United States Circuit Court of Appeals for the First Circuit reversed an income tax conviction because the prosecuting attorney violated Canon 15 at the trial. Greenberg v. United States, 29 LW 2023 (C.C.A. 1st Cir., July 12, 1960).

<sup>\*</sup> The Canons of Professional Ethics are contained in New York State. Judiciary Law (McKinney's Book 29, 1948), Appendix, p. 764. In New York, an attorney will be disciplined for violation of these canons. *Matter of Neuman*, 169 App. Div. 638.

Petitioner's counsel replied that he was relying on Matter of Grae (282 N. Y. 428) and Matter of Ellis (282 N. Y. 435), as holding that there could not be any "consequences" to lawyers for "doing what they had an absolute legal right to do" (R. 58). Petitioner was given a further opportunity by the court to answer but persisted in his refusal (R. 59-60), all this being admitted in his pleading in this proceeding (R. 61-62).

Thereafter, the Justice presiding at the Judicial Inquiry filed with the Appellate Division a transcript of the proceedings had before him with a recommendation that disciplinary proceedings be instituted against petitioner (R. 17).

The Appellate Division directed this respondent, counsel to the Inquiry, to commence disciplinary proceedings against petitioner (R. 17). In accordance with section 90, subd. 6, of the Judiciary Law, respondent instituted disciplinary proceedings against petitioner by service upon him of an order to show cause and a petition containing the charge against petitioner (R. 5-16). Petitioner's answer admitted all of the factual allegations in the petition (R. 61-62). Thus, there was raised no issue of fact to be tried.

Accordingly, there remained for consideration by the Appellate Division a question of law only which was posed by petitioner in his affirmative defense, namely, that "he was within his legal and constitutional rights and moral prerogative in pleading the privilege against self-incrimination • • • under Article 1, Section 6 of the New York State Constitution," and that, under the circumstances "the imposition of any discipline upon • • (petitioner) • • would be a denial to him of due process in violation of his rights under the Constitution of the State of New York and under the Fourteenth Amendment of the Constitution of the United States" (R. 61-62).

After submission of briefs and oral argument, the proceeding before the Appellate Division culminated in its order of disbarment dated December 31, 1959 (R. 3). On appeal to the Court of Appeals, this order was aftirmed (April 1, 1960).

# Summary of Argument

I. Membership in the Bar is a privilege burdened with exacting conditions. The status of one who becomes a member of the Bar is akin to that of a trustee or fiduciary and the conditions of membership in the Bar are continuing and may not be broken after admission to the Bar. If such conditions are broken the privilege to practice law is lost.

Among the conditions imposed upon the lawyer-fiduciary are the duties: to cooperate with the Court in the conduct of a judicial inquiry; to answer relevant questions posed by the Court or by the agency conducting the inquiry on its behalf; and to give an accounting of his stewardship as a lawyer.

The refusal of a lawyer to answer relevant questions, without-more, constitutes a breach of those duties, and warrants the taking of disciplinary action against the lawyer.

II. The fact that a lawyer chooses to place his refusal to answer on a claim of his constitutional privilege against self-incrimination does not rob the Court of its power to discipline the lawyer for refusing to answer relevant questions.

The lawyer is not being disciplined for invoking his constitutional privilege but for a breach of his lawyer's duty to speak up. The lawyer like every other citizen, is entitled to invoke the constitutional privilege and the courts must sustain such invocation. This is the full extent of the constitutional guerantee.

However, the lawyer is more than an ordinary citizen; he is a citizen-plus whose duty of forthrightness and candor is as great, if not indeed greater, than that of public employees who are subject to dismissal for lack of candor notwithstanding the plea of the constitutional privilege. (See Lerner v. Casey, 2 N. Y. 2d 355, aff'd, 357 U. S. 468; Beilan v. Board of Educ., 357 U. S. 399; Nelson v. Los Angeles County, 362 U. S. 1; Christal v. Police Comm., 33 Cal. App. 2d 564; Canteline v. McClellan, 282 N. Y. 166; McAuliffe v. N. Bedford, 155 Mass. 216.)

III. The petitioner was accorded the fullest measure of procedural due process.

The petitioner was not disciplined because he failed to meet undisclosed information from unknown sources. The prime source of information as to petitioner's activities was his own Statements of Retainer filed by him with the Appellate Division. He was disciplined for his refusal to answer relevant questions, based upon information obtained from his own records.

At all times petitioner had the full benefit of counsel. During the course of the inquiry he was fully advised of his duty to answer and of the fact that his refusal to answer might give rise to disciplinary action. In spite of such warnings he persisted in his course of refusal to answer.

Accordingly, the claim that petitioner was deprived of procedural due process is without substance.

#### POINT I

In a judicial inquiry ordered by the Appellate Division into unethical practices of lawyers, petitioner as an attorney and officer of the court, was under a duty to answer all relevant questions relating to his professional conduct. For a breach of that duty the lawyer is subject to disciplinary action—not by way of punishment, but for the protection of the public, the Bench and the Bar.

### "Membership in the Bar is a Privilege Burdened With Conditions."

Settled beyond doubt is the rule that membership in the Bar is not a right but a privilege burdened with continuous and exacting conditions, with particular emphasis upon character and fitness. As Judge Cardozo wrote in Matter of Rouss, 221 N. Y. 81, 84-85 (1917):

"Membership in the Bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. " Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for his past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment."

Also, as Chief Judge Cardozo affirmed in People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470-471, a lawyer is "an officer of the court, and like the court itself, an instrument

or agency to advance the ends of justice," and: "Cooperation between court and officer in furtherance of justice is a phrase without reality if the officer may then be silent in the face of a command to speak."

In the case at bar, the Appellate Division and the Court of Appeals emphasized that membership in the legal profession is a revocable privilege. Our New York courts followed the rule of this court, that: "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice" (Vinson, Ch. J., In re Isserman, 345 U. S. 286, 289).

Furthermore, the courts of New York have here simply applied their sanction to the standards of conduct for lawyers so eloquently promulgated by this Court: that a lawyer must be imbued with and demonstrate "those qualities of truth-speaking, of a high sense of honor, of granite-discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character' which has been the historic unquestioned prerequisite of fitness' to be a member of the Bar, and that to 'a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts' ' (Mr. Justice Frankfurter in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 247-249). (Emphasis ours.)

### Plenary Power of the Court to Supervise and Control the Conduct of Attorneys.

Mindful that membership in the Bar is a revocable privilege, we turn to a consideration of the court's power to suprvise and control the conduct of attorneys.

A scholarly review of the history of the far-reaching control possessed by the courts over the conduct of attorneys is narrated by CARDOZO, Ch. J., in Karlin, supra. He

points out (at pp. 471-472) that Section 27 of the New York State Constitution of 1777 provided that all attorneys appointed and licensed to practice shall be "regulated by the rules and orders" of the courts. Particularly relevant to the questions posed by the case at bar is the discussion in Karlin of the centuries old procedure in England whereby a barrister was under a duty to answer regarding his professional behavior under penalty of expulsion, pages 472-473:

"Would the men who framed the Constitution of 1777 have been in doubt for a moment that a rule or order might be made whereby lawyers would be under a duty, when so directed by the court, to give aid by their testimony in uncovering abuses? We find the answer to these questions when we view the history of the profession in its home across the seas.

The power of the judiciary to supervise and control the conduct of attorneys is no less plenary today than it was when our system of jurisprudence was first established. That power is not only vested in the Appellate Division by statute (Judiciary Law, Section 90), but it is also inherent in the court (Matter of Bar Association of the City of New York, 222 App. Div. 580, 584).

<sup>\*</sup> The visitors were the judges who had supervisory control over the inns of court and who exercised this control if the benchers of the inns failed to perform their duties.

<sup>\*\*</sup> See also opinion of the Appellate Division in the instant case (R. 90-91; 9 A. D. 2d at 439-440).

It is also evident that a preliminary inquiry as to a lawyer's conduct may be made by the court itself or it may appoint someone else for that purpose. Judiciary Law, Section 90, subd. 6; People ex rel. Karlin v. Culkin, supra; Matter of Bar Association of the City of New York, supra; Matter of Brooklyn Bar Association, 223 App. Div. 149 (2nd Dept. 1928). Here, the Appellate Division directed that the investigation be conducted on its behalf by the Judicial Inquiry. The Supreme Court Justice presiding at the inquiry was directed to hear the evidence and to report his findings and recommendations to the Appellate Division. Thus, the Judicial Inquiry is the alter ego of the court. As such, a proper relevant question asked by the Judicial Inquiry is the same as if the question were asked directly by the Appellate Division.

To complement Section 90, the Appellate Division has promulgated Special Rules regulating the conduct of atterneys in its Judicial Department. The genesis of such rules is in previous judicial inquiries. For example, with respect to "negligence cases," Rule 3 requires an attorney to file a statement of retainer setting forth certain prescribed items of information. We specifically mention Rule 3 because the questions that petitioner refused to answer and the records that he refused to produce relate to the very negligence cases for which he was required to file a statement of retainer. In this connection, we again repeat that most of the factual data included in the questions put to petitioner came from petitioner's filed Statements of Retainer.

### Basis of Disciplinary Charge Preferred Against Petitioner.

Having demonstrated that membership in the Bar is a privilege burdened with continuous conditions, and that the courts have plenary power to determine whether an attorney has breached one of such conditions, we turn to the charge leveled against petitioner.

Petitioner was charged with professional misconduct, the specification of misconduct being set forth in paragraph 23 of the petition submitted by respondent (R. 15).

Because of petitioner's insistence that he was disciplined for asserting his constitutional privilege, we emphasize the fact that the petition presented to the court by respondent sought to discipline petitioner, not on the ground that he chad asserted his constitutional privilege against self-incrimination, but precisely upon the ground (as stated in paragraph 23 of the petition) that his refusal to answer relevant questions and his refusal to produce relevant records "are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession", in that such refusals: (a) are "contrary to the standards of candor and frankness that are required • • • of a lawyer to the Court", (b) are "in defiance of. and flout the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer", (c) have "hin-dered and impeded the Judicial Inquiry" which had been ordered by the Appellate Division, and (d) have resulted in respondent's withholding "vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession" (R. 15).

In this context, the Appellate Division plainly stated the issue presented to it (R. 65):

"Thus, the sole question for our determination is whether the " " [petitioner], by reason of his refusal to answer relevant questions and to produce relevant records, may be disciplined as a lawyer " "."

The Appellate Division and the Court of Appeals of the State of New York have both ruled that petitioner laid himself open to discipline when he refused to answer relevant questions and produce relevant records for the information and scrutiny of the Appellate Division in the course of that court's inquiry and investigation.

# The Lawyer's Duty to Answer Relevant Questions in a Judicial Inquiry.

It has already been shown that "Membership in the bar is a privilege burdened with conditions" (Matter of Rouss, 221 N. Y. 81, 85, supra). In affirming the order disbarring petitioner, the Court of Appeals noted that (R. 85):

"Those conditions must not be arbitrary but the proper and appropriate ones are numerous."

Among other things an attorney cannot solicit retainers or employ others to solicit them for him, or divide his fees with laymen (New York Penal Law, Secs. 270-a, 270-b, 270-c, 270-d, 276). If he knows of such practices by others, he must inform the court (Canon 29) and he must be candid and frank with the court at all times (Canon 22).

That being so, it follows that a lawyer, obviously possessing pertinent information, owes a duty to the Bar and to the court to help expose and uproot such evil practices and corruption at the Bar and in the courts with respect to negligence cases. Manifestly, such duty can be discharged only by candid answers to relevant questions. In the words of the Appellate Division (R. 67-68):

"Can he [the lawyer], with impunity, disregard the canons of e hics and cast to the winds all inquiries into his professional conduct as a lawyer? Can he disregard his obligation to be frank and caudid with the court? Can he negate his duty to cooperate with this court to expose the evil and unethical practices at the Bar and in the courts? Can he refuse to assist this court in its quest to maintain the integrity and morality of the members of the Bar and to maintain the high standards of the legal profession? We say, emphatically no." (Emphasis ours.)

In licensing a person to practice the profession of the law, the court represents to society at large that here

is an honorable man deserving of its trust and confidence—one who is worthy to uphold the honor of the profession and the dignity of the court. When the lawyer, as an officer of the court, refuses to give an accounting of his stewardship, and refuses to answer to the court for his professional practices, then the lawyer loses his "good standing" as an instrument or agency to advance the ends of justice. (See Theard v. United States, 354 U. S. 278, 281.) Disbarment must follow because the court can no longer represent to the public that the lawyer is worthy of its trust and confidence. Hence, the courts say that disbarment is not by way of punishment of the individual, but "for the protection of both the court and the public " from the official ministration of persons unfit to practice" (Ex parte Wall, 107 U. S. 265, 288, 307).

The principle thus enunciated was adopted by the American Bar Association in this language: "The purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice, and not the punishment of the person disciplined."

Counsel for petitioner indulges in dire predictions with respect to the ruling in this case upon every New York lawyer similarly situated and indeed upon all non-lawyer licensees not here even remotely involved. Such speculation has no bearing upon the problem of whether this particular case offends federal due process. Nor are we here concerned with anyone except a member of the bar—a professional burdened with fiduciary responsibility.

The opinions of the New York courts in this case formulate and enunciate state policy specifically governing the conduct of New York lawyers. The standard of conduct mandated for lawyers is high but no higher than the standard traditionally demanded by our courts down through

<sup>\*</sup> See also Drinker on "Legal Ethics", pages 35-38.

<sup>\*\* 80</sup> A. B. A. Rep. (1955) 470.

the centuries. (See People ex rel. Karlin v. Culkin, 248 N. Y. 465.) The promulgation of such standards by a local state court do not in any sense violate federal due process. The state courts rejected petitioner's contention that he was deprived of due process—and did so upon a rational basis and solid grounds.

When an applicant is admitted to the bar, he is held out and certified by the admitting court as a person in whom the court places its confidence and trust (see Drinker "Legal Ethics", pp. 36, 37 and cases cited). Upon the basis of that representation, clients confide their most precious causes to him. Relying upon the court's certification, clients entrust the lawyer with their most sacred confidences, with the defense of their properties, their liberties and their lives. Clients every day place such trust even in lawyers who are strangers to them and whom they meet for the first time when in difficulty.

In a broader sense, every American lawyer is a trustee of the vast rich heritage of the common law and all that it stands for. Thus, upon admission, in reality a lawyer becomes a trustee. It is for this reason that the courts below spurned the concept that an attorney is a mere licensee of the State, with no higher obligations than a bare licensee, or that the lawyer here has been consigned to the same category as such licensees as bail bondsmen, hairdressers, restaurant owners, morticians taxicab drivers, merchants, peddlers, and motorists, as urged by our adversaries.

To the contrary, the courts below have simply reaffirmed that the status of an attorney is more akin to that of a trustee or fiduciary and that his obligations and responsibilities are just as sacrosanct, if not more so. That this is the historic view of the exalted status of the lawyer in American society has been uniformly attested to by our courts time and again. (Schware v. Board of Bar Examiners of New Mexico, 353 U. S. 232, 247; Matter of Williams, 158 F. Supp. 279, 280.)

When a trustee or fiduciary is called upon to give an accounting of his stewardship he must do so or forfeit his trusteeship. That is the case here.

In the landmark case of Meinhard v. Salmon, 249 N. Y. 458, Chief Judge Cardozo spelled out the nature of a trustee's duty in these now famous words:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."

Such language is applicable in full force to all those who become trustees of the heritage of the law.

The thrust of petitioner's argument is that he was arbitrarily deprived of the privilege of practicing law. This argument closes its eyes to the record; it is blind and deaf to the profound reasoning and judging contained in the opinions of the courts of New York in this case.

Petitioner was disciplined for the breach of one of the conditions with which the privilege of membership in the Bar is burdened. He was disciplined precisely for refusing to give an accounting of his stewardship as a lawyer; for lack of candor; for breach of his inherent obligation as an officer of the court; and for impeding the inquiry ordered by the court. For these reasons, the courts of New York decreed that he could be steward no longer.

Petitioner's claim that he was arbitrarily disciplined is based upon the notion that no state may constitutionally discipline a lawyer for refusing to answer relevant questions posed by a state judicial inquiry. (See Petitioner's brief, pp. 21, et seq.) These are strange words to be spoken by a fiduciary of the public trust.

This court has held that public employees are subject to dismissal for refusing to answer pertinent questions posed by the employer-municipality (Lerner v. Casey, 2 N. Y. 2d 355, affd. 357 U. S. 468; Beilan v. Board of Educ., 357 U. S. 399; Nelson v. Los Angeles County, 362 U. St 1; and see Christal v. Police Comm., 33 Cal. App. 2d 564; Canteline v. McClellan, 282 N. Y. 166). The underlying theme of these cases is that the duty of forthrightness attaches to public employment. Simply put, whenever a public employer questions an employee it is entitled to answers, and to honest answers, from its employee. Phrased differently, these cases stand for the proposition that public employment is burdened with conditions, one of the conditions being forthrightness.

Can it reasonably be said that a lawyer's duty of forthrightness to his supervisory court is not as great as that of a public employee to his superior? Has the character of the legal profession sunk to the low level where the duty of candor which an attorney owes the bench, bar and public is not as great as that which a subway conductor (the Lerner case) owes to the public? Yet, this is the end result which petitioner's principal argument in this Court would make inevitable.

If, as the courts of New York State with sound reason and abundant precedent have held, the refusal of a lawyer, without more, to answer relevant questions posed by a state judicial inquiry warrants the taking of disciplinary action against the lawyer, the fact that the lawyer may have chosen to place his refusal on a claim of constitutional privilege against self-incrimination does not put the matter in any different posture. As a citizen, he may thus escape possible criminal prosecution. But, as an officer of the court, he may not thus shirk the solemn obligations of his lawyerhood.

#### POINT II

As a citizen petitioner had the right to invoke the constitutional privilege against self-incrimination. As a lawyer, petitioner was under a duty to answer to the court. Petitioner may not evade the disciplinary consequences for a breach of his duty to speak up as a lawyer by choosing to remain silent under the exercise of his constitutional privilege.

In this Court, as in the New York State courts, petitioner persists in asserting that he was disciplined for invoking his constitutional privilege against self-incrimination. The opinions below belie any such claim.

The Appellate Division, in disbarring petitioner, specifically declared (R. 76-77):

"To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is not the fact that respondent has invoked his constitutional privilege against self-incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition of his retention of the privilege of remaining a member, of the Bar."

Petitioner takes the view that the foregoing statement of the Appellate Division is grounded in semantics. This Court has already rejected the "semantics" argument in the cases of Lerner v. Casey, 357 U. S. 468, aff'g, 2 N. Y. 2d 355, aff'g, 2 A. D. 2d 1; Beilan v. Board of Education, 357 U. S. 399; and Nelson v. Los Angeles County, 362 U. S. 1.

In Lerner, petitioner was an employee of the New York City Transit Authority. He refused to answer questions of his employer based on the exercise of his privilege against self-incrimination. On that premise, Lerner argued that he could not be dismissed. The Appellate Division rejected that contention and upheld Lerner's dismissal for refusal to answer "on whatever grounds" (2 A. D. 2d 355). Chief Judge Conway, who wrote the opinion for the Court of Appeals, reaffirmed the fact that petitioner had not been discharged for invoking the privilege against self-incrimination but for refusing to answer relevant questions concerning his trustworthiness and reliability.

To prove the truth of this statement Chief Judge Conway employed a supposititious example (2 N. Y. 2d at p. 369):

"It seems to us that it would be more clear if we supposititiously divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist Party. That question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose, then as the second part of his conduct, he returned five minutes later and told the Commissioner of Investigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned o to the Commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation require that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter. of law? We think not."

The order of the Court of Appeals in Lerner was affirmed by this Court (357 U. S. 468) upon the reasoning that Lerner's dismissal for his refusal to answer "was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal" (Mr. Justice Harlan at p. 476).

In Beilan, supra, a school teacher was dismissed for refusing to answer relevant questions in an inquiry by the Superintendent of Schools. This Court upheld the dismissal stating (357 U. S. at pp. 405-406):

"By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and co-operation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher."

In Nelson, petitioners had been ordered by their employer, the County of Los Angeles, to answer any questions asked of them by a Congressional subcommittee before which they had been subpoenaed. There was a California statute making it the duty of any public employee so subpoenaed to answer any questions as to his membership in any organization advocating the forceful overthrow of the United States government. Petitioners refused to answer any questions on Fifth Amendment grounds and were thereupon discharged from their county employment.

This Court, following Lerner and Beilan, supra, held that they had been validly separated from their employment not for invoking their constitutional privilege but for insubordination under California law.

Mr. Justice Clark, writing for the majority of this Court, stated that if these men had simply refused without more to answer the subcommittee's questions, the county could certainly have discharged them, and the fact that they chose to place their refusal on a Fifth Amendment claim put the matter in no different posture since their assertion of that claim was not used as a basis for drawing an inference of guilt. (See, also, Christal v. Police Comm. of San Francisco, 33 Cal. App. 2d 564, 9 P. 2d 416.)

So here, the petitioner, "an officer of the court, and like the court itself, an instrument " of justice" (People ex rct. Karlin v. Culkin, 248 N. Y. 465, 470-471) was under an obligation to cooperate with the Appellate Division in its judicial inquiry bearing upon the professional conduct of attorneys by answering the court's relevant questions. Failure to perform that obligation would frustrate the court and render it impotent to perform its statutory and inherent duty to clean up the Bar. Petitioner's refusal to answer such questions constituted a breach of his duty, warranting disciplinary action by the Appellate Division.

Petitioner seeks to escape the impact of Lerner, Beilan; and Nelson by claiming that the principle of those cases is restricted to cases where a public employee refuses to answer relevant questions posed by his employer. The cardinal principle of those cases cannot be so restricted.

For, the philosophy underlying Lerner, Beilan and Nelson applies with equal, if not greater, force to the case at bar. The determining factor is that in each of the cases, including the instant one, there is the positive duty to speak up or get out. It matters not whether the relationship is one of public employment so long as "the public interest" is directly involved.

Quick to recognize "the settled distinction between the rights of private citizens and those of public employees" (Petitioner's Brief, p. 35), nevertheless throughout his brief, petitioner professes to perceive no difference in the dual capacity of the citizen-law er, when called as a witness in a judicial inquiry by the court.

Can it rationally be said that the duty of an attorney vis-a-vis-the court which admitted him and is chargeable with control over his professional conduct, is any less sacred than the duty to the public employer of a subway conductor (the *Lerner* case), a teacher (the *Beilan* case), or a policeman (the *Christal* case)? Is not the duty of the lawyer higher than any of these non-lawyers? And, is the public interest any less vital in the case of the attorney?

In the ultimate, the fundamental principle is the same, namely, that he who refuses to answer when, in the public interest, it is his duty to speak, must bear the consequences.

The Court of Appeals, in affirming the order disbarring petitioner, summed this up in these words:

"In those cited cases (i.e., Lerner, Beilan, Nelson and Globe, and Christal) the duty to co-operate in investigations by answering relevant questions was found in statutes or constitutions. The lawyer's duty is found elsewhere—in the common law and in the Canons of Ethics—but it is just as plainly written. In this State a lawyer on admission to the Bar takes the same oath as does a public official (see Judiciary Law, Sec. 466)" (R. 86)

As demonstrated above, the New York Court of Appeals has ruled that the petitioner was not disciplined for having invoked his New York State privilege against self-incrimination (N. Y. Const., Art. I, Sec. 6); that he was disciplined for having refused to answer relevant questions in the judicial inquiry, such conduct having constituted a breach of the condition on which depended his privilege of membership in the Bar (Matter of Rouss, 221 N. Y. 81); and that the posture of the matter was not changed by the fact that he chose to place his refusal to answer on a claim of the New York State privilege against self-incrimination.

That aspect of the decision of the New York Court of Appeals, which involves an interpretation of state law and a construction of the State Constitution only, is, we believe, beyond review by this Court.

#### The Lawyer's Role as a Fiduciary

Reference has already been made to the fact that the status of a lawyer is akin to that of a trustee or fiduciary, charged with "the punctilio of an honor the most sensitive."

Where a court ousts a trustee who refuses to render his account under a plea of constitutional privilege, the trustee's claim of deprivation of due process has no validity; he is ousted precisely because he refuses to perform his duty. To ward off his ousting, the trustee cannot be heard to assert that the beneficiaries must, in the first instance, prove an affirmative case against him. The right to formal accusation and proof, to confrontation and cross-examination of witnesses, is beside the point where there is the absolute positive duty of rendering a true account in the first instance. An attorney-trustee is in no different position.

The New York courts, while readily subscribing to the proposition that invocation of the State constitutional privilege against self-incrimination is the right of every citizen and must be sustained, refused to subscribe to the narrow view that the privilege itself is the sole measure of a lawyer's entire duty or to the categorical conclusion that the exercise of the right, in refusing to answer pertinent questions, can never under any circumstances be a breach of a lawyer's duty to the court.

#### Conflicting Views as to the Lawyer's Status.

These important considerations point up the fact that the opposing views in this case reflect two conflicting concepts of the role of the lawyer in American society. In substance, our adversaries urge that if the view of the courts below should prevail, then the lawyer is relegated to second-class citizenship for the reason that he is penalized for pleading the privilege-accorded to every citizen.

On the contrary, our courts hold that a lawyer like every other citizen may invoke his privilege, that the courts must sustain such invocation, and that is the full extent and protection of the constitutional guarantee. They take the view, however, that a lawver is more than a citizen, that he is a citizen-plus; that he has undertaken far higher obligations than an ordinary citizen: that as trustee of a priceless res\*—the true administration of justice as the firmest foundation of the republic-he must, when called upon by the very court that admitted him and certified his trustworthiness, and which has plenary supervision over his conduct every moment of his professional life, render a true accounting of his stewardship. Contrary to petitioner's contention, firm insistence by the courts upon the fulfillment of that obligation by the lawyer-trustee strikes no blow at a lawyer's liberty or independence, for he assumed that obligation from the very day of his admission to the Bar.

In striking contrast to the prophecies of petitioner, affirmance of this order of disbarment will have a most salutary and beneficial impact upon the practice of the law

<sup>\*</sup> This trust res of the lawyer was defined, in his own inimitable way, by Mr. Justice Holmes as,

<sup>&</sup>quot;the body of our jurisprudence,—that vast cenotaph shaped on the genius of our race, and by powers greater than the greatest individual, yet to which the least may make their contribution and inscribe it with their names. The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society." (Holmes, Daniel S. Richardson [1890], in Speeches [1913] 46, 47-48.)

in New York State. For if repeated affirmation by our courts that lawyers truly are officers of the court and instruments of justice is not mere rhetorical bombast and a species of semantic indulgence, then lawyers must act and speak out as such and not seek to shirk their solemn obligations as lawyers under the guise of being only plain ordinary citizens.

The standard of conduct for the lawyer cannot be equated to the standard of conduct for the citizen without diminution in stature and loss of prestige for the lawyer. For, if the lawyer is charged with no special duties, no higher obligations, and no more solemn responsibilities above those of the citizen who is not a lawyer, then the law has lost its ideals and the profession can claim nowhere near the lofty status it so proudly professes to hold.

## Answers to Other Arguments.

Earlier we recited the fact that petitioner declared in refusing to answer the pertinent questions posed to him, that he was supported in his position by the cases of Matter of Grae, 282 N. Y. 428 and Matter of Ellis, 282 N. Y. 435. The Court of Appeals has ruled that petitioner has misconstrued the holding in those cases (R. 87). That ruling involves only the interpretation to be placed upon state court decisions and is, therefore, not open to review in this Court.

The fact of the matter is, however, that the difference in the cases is substantial. In *Grae* and *Ellis* the question was whether a lawyer who offered to answer at a judicial inquiry all pertinent questions could be compelled to waive immunity in advance of questioning thereby yielding his constitutional privilege even before interrogation began. Such a waiver would have held the door open for the lawyers' prosecution for crime upon the basis of their own testimony. The holding in each case was that a lawyer,

like every other citizen, is constitutionally privileged not to answer damaging questions.

By contrast, in the present case, petitioner when called upon to testify actually pleaded his constitutional privilege against self-incrimination and was sustained in that plea. He was thus accorded all that the State and Federal Constitutions guarantee and the door was closed to prosecuting him for crime upon the basis of his own testimony.

To implement his argument that the courts of New York acted without solid reason in this case, petitioner attempts to draw an analogy between an attorney's plea of his privilege and an attorney's reliance upon statutes and government departmental regulations forbidding disclosure of confidential communications, in refusing to testify (Brief, pp. 22, 23). Again, petitioner fails to distinguish between a situation where the lawyer has freedom of choice (the voluntary plea of his privilege), and a case where the lawyer has no freedom of choice, for prohibited disclosures are binding upon lawyer and court alike,

Finally, petitioner argues that this Court should not hesitate to hold that New York has acted arbitrarily in disciplining him, since his refusal to testify has not left the State of New York impotent to obtain the information it claims to want from him. He goes on to suggest that the State of New York need only summon him before a grand jury and grant him immunity from criminal prosecution to learn from him all that it desires to know. In aid of that proposition petitioner cites a case which completely demolishes his thesis, namely, the case of In Re Cioffi, 21 Misc. 2d 808, aff'd, 10 A: D. 2d 425, aff'd N.Y.L.J., July 12, 1960 p. 6, col. 3 (New York Court of Appeals).

In Cioffi, two attorneys were called before the grand jury and were asked whether they had ever been employed by a certain law firm in Kings County. Notwithstanding the fact that the grand jury had granted them full immunity from criminal prospection had they answered the question, they refused to answer, relying on their constitutional privilege against self-incrimination. Instead of obtaining the information he sought, the District Attorney was blocked, as we were, by the attorneys' refusal to answer questions—a situation parallel to that of the instant case.

It is curious that petitioner should rely on Cioffi for another reason. Respondent is personally familiar with all the facts which are substantiated by the official court records. Originally, Cioffi and another attorney were called before this judicial inquiry and questioned. They pleaded their privilege, So did seven (7) others in the same law office—five (5) of whom were attorneys. For that reason Mr. Justice Arkwright recommended referral of the cases of all nine (9) to the District Attorney for criminal prosecution or disciplinary proceedings. That is how Cioffi and another came before the grand jury. They repeated their silent performance there.

What is more, in People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470, Chief Judge Cardozo pointed out that the grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law; that there are many forms of professional misconduct that do not amount to crime; that inquisition by the court with a view to the discipline of its officers is more than a superfluous duplication of inquisition by the grand jury with a view to the punishment of criminals; and that the two fields of action are diverse and independent. Accordingly, which course of several it shall pursue becomes strictly a matter of State policy.

### POINT III

Petitioner has been accorded the fullest measure of procedural due process.

There is no substance to petitioner's argument that he was denied procedural due process of law. The fallacy of petitioner's argument is that it is predicated upon charges that do not exist in the case and were never preferred against him. Contrary to petitioner's assertion, he is not being asked to defend himself against unseen informers and claimed adverse information. As pointed out earlier, most of the questions were based upon facts recited in petitioner's own Statements of Retainer or in official court records. Yet, the single charge against petitioner was his refusal to answer brought about entirely by his own conduct in resisting the judicial inquiry in the area of questioning that related solely to petitioner's professional conduct.

Due process means in essence that every citizen, no matter what his calling, must be accorded fair play. That is the very foundation of our American jurispradence. It is difficult to conceive how this petitioner was denied any rudiment of due process. We believe that on the issue of due process the record in this case is impregnable.

The record being the best answer to the question of due process, we invite the Court's attention to the following highlights:

1. Petitioner was given ample notice of the hearing before the Judicial Inquiry on October 28, 1958. He was fully apprised of his rights as a witness before the Inquiry as well as of the scope and basis of the Inquiry. Although given full opportunity to answer pertinent questions, he refused to do so (R. 22, et seq.).

<sup>\*</sup> On page 7, supra, it is shown that specific persons were named when petitioner was being examined.

More than six months later—on May 19, 1959, after due notice, petitioner was recalled before the Judicial Inquiry. Prior to his reappearance, both petitioner and his counsel—on May 12, 1959—were furnished with copies of the order of the Appellate Division dated January 21, 1957 establishing the Judicial Inquiry (R. 30, et seq.).

- 3. At the very outset of the hearing, petitioner was again advised in detail as to the purpose, basis and scope of the Inquiry's investigation. Among other things, petitioner was advised that the Inquiry "is not an adversary proceeding" and that "You are not a defendant or a respondent in any sense at this time;" that "You are not now being charged with anything "at this time, and the Inquiry at this juncture seeks merely to ascertain pertinent facts from you that are within the scope of the Inquiry and that bear on or relate to your professional conduct" (R. 32-33).
  - 4. Petitioner was also permitted to seek advice of his counsel at any stage of the Inquiry and was also invited to ask any questions or make any statement before proceeding with the questioning (R. 33, et seq.).
  - 5. Before the hearing was concluded, petitioner was fully advised of his duty to answer; of the "possible serious consequences that may flow from your refusal to answer", and that such failure to answer "may well give rise to disciplinary action" (R. 57-58).
  - 6. There followed the preferment of the disciplinary charge, petitioner's answer thereto, submission of briefs and oral argument before the Appellate Division, culminating in the order of disbarment.

In the light of the foregoing, we deem further commentunnecessary. Petitioner was accorded every attribute of due process.

#### Conclusion

The principle for which we are here contending has an importance that far transcends this particular case. As the Appellate Division observed (R. 65):

"This question goes to the heart of a serious and far-reaching problem confronting the Bar, the courts and the public. When this question is finally resolved it will affect the standing at the Bar, not only of this "[petitioner], but of many other lawyers who similarly have asserted their constitutional privilege against self-incrimination as a basis for refusing to divulge pertinent information with respect to their practices in relation to negligence cases. The resolution of this question will also determine in large measure whether this court's supervisory and regulatory power over lawyers, and whether this court's plenary power to curb all evil and unethical practices: in the profession of the law, are to be suppressed and subverted, and whether this court is to be rendered impotent in the performance of its inherent and statutory duties relating to attorneys and to the administration of justice."

Mindful of the gravity of the question that is presented for determination by this Court, we affirm that we do not seek to trespass upon or invade the constitutional right against self-incrimination granted to every citizen, whether or not he be a lawyer. (The record here fully bears out the care and the caution with which we approached the presentation of this important case). The Bar should be ever zealous to protect that right against any encroachment. However, where the assertion of that constitutional right by one who is a lawyer and officer of the court is inconsistent and incompatible with his duty of candor to the court, the lawyer must make a choice. If he deliberately chooses, as is his unquestioned right as a citizen, to assert

his constitutional privilege and thereby remain silent when it is his professional duty to speak out as a lawyer, then he must bear the consequences. For conduct unbecoming an officer of the court, by breach of his special duty as a lawyer, he may no longer remain as a trustee in the administration of justice by the Bench and the Bar.

We respectfully submit, therefore, that this Court, as the nation's supreme guardian of the true administration of justice, should in all respects lend its sanction to this ruling of the courts of New York.

#### The order of disbarment should be affirmed.

Dated: September 15, 1960. Brooklyn, N. Y.

DENIS M. HUBLEY,
Attorney and Counsel for Respondent,
Office and Post Office Address,
Borough Hall,
Brooklyn 1, New York.

MICHAEL A. CASTALDI, MICHAEL CAPUTO, JAMES F. NIEHOFF, Of counsel.

## APPENDIX

### To the Clerk of the Appellate Division, Second Judicial Bepartment

This statement as to Retainer is filed pursuant to and in compliance with Rule 3 of the Special Rules regulating the conduct of attorneys and counsellors at law in the Second Judicial Department.\*

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IN THE

## SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 84

In the Matter of:

ALBERT MARTIN COHEN, Petitioner,

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DENIS M. HURLEY, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE.

AMICUS CURIAE BRIEF OF STANDING COMMITTEE ON PROFESSIONAL GRIEVANCES OF THE AMERICAN BAR ASSOCIATION.

#### ROBERT P. HOBSON.

1805-26 Kentucky Home Life Bldg., Louisville 2, Kentucky,

Attorney for Standing Committee on Professional Grievances of the American Bar Association.

# Supreme Court of the United States

No. 84

IN THE MATTER OF:
ALBERT MARTIN COHEN, Petitioner,

v.

DENIS M. HURLEY, Respondent.

MOTION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF ON BEHALF OF STANDING COMMITTEE ON PROFESSIONAL GRIEVANCES OF THE AMERICAN BAR ASSOCIATION.

Comes the Standing Committee on Professional Grievances of the American Bar Association, by counsel, and moves the Court that it be permitted to file its amicus curiae brief in the above action. This case is of utmost importance to the bar at large and to the American Bar Association, and for that reason permission is requested for the filing of this brief.

ROBERT P. HOBSON,

1805-26 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,

Attorney for Standing Committee on
Professional Grievances of the
American Bar Association.

#### 13 THE

# Supreme Court of the United States

. No. 84

IN THE MATTER OF:
ALBERT MARTIN COHEN, Petitioner,

DENIS M. HURLEY, Respondent.

### ON PROPERTIONAL CRIEVANCES OF THE AMERICAN BAR ASSOCIATION.

Petitioner, Albert Martin Cohen, appeals to this Court on a writ of certiorari to the Court of Appeals of the State of New York. On such appeal, petitioner seeks review of an order disbarring him from the practice of law for professional misconduct. The misconduct was that he hindered a judicial inquiry by (a) refusing to answer questions which were relevant to the inquiry and (b) refusing to produce records set forth in a subpoena duces tecum, which records were relative to the inquiry.

#### JURISDICTION.

The order of the Court of Appeals of the State or New York was entered April 1, 1960. The petition for certiorari was filed May 7, 1960, and was granted June 6, 1960. The jurisdiction of this Court rests on 28 U. S. C., Sec. 1257(3).

#### ARGUMENT.

Respondent contends that he cannot be disbarred because he claimed the privilege given him by United States Constitution, Amendment XIV, Section 1, Clause 2:

". . . nor shall any state deprive any person of . . . liberty, or property without due process of law . . ."

This amicus curiae brief is filed by the Standing Committee on Professional Grievances of the American Bar Association in support of the proceeding.

The proceeding in this case was an inquiry with respect to the alleged illegal, corrupt and unethical practices of certain attorneys in Kings County. The rules of the Appellate Division provide that in contingent fee agreements they must be filed with the Court and if he enters into five or more such agreements in any year he must give the Court, in writing, certain particulars. Petitioner filed 228 statements for the years 1954 through '58.

It is contended here by petitioner that his claim of immunity under Section 5 of the Bill of Rights

cannot be the basis for disbarment and that he has been deprived of his liberty and property without due process of law. It is submitted here that neither of these contentions is sound because petitioner in this proceeding is not just an ordinary citizen to whom the immunity would apply, but is a practicing lawyer who procures and holds the authority for his conduct from the State through the very court which imposed the sentence of disbarment.

We assume that it cannot be argued that the inquiry of the Appellate Division was not properly authorized or that petitioner was not subject to this inquiry. These facts being admitted, it is now asserted that petitioner was compellable and should produce for the consideration of the Committee the records which the inquiry called for. His plain refusal to do that not once, but on numerous occasions, renders him subject to the discipline imposed upon him and he may free himself from the effect of this order by complying with the order of the Court at any time.

The American Bar Association, through its Committee on Professional Grievances, hereby supports the action of the Judicial Inquiry Committee and respectfully asks that the judgment of the Court of Appeals of New York be affirmed.

Respectfully submitted,

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#### PROOF OF SERVICE.

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\* This statement as to retainer must, within 30 days from the date of the retainer or agreement of compensation be signed by the attorney and filed personally by the attorney or his representatives, or by registered mail, in the office of the clerk of the Appellate Division, Second Judicial Department. It may also be filed by ordinary mail, provided it is accompanied by a self-addressed stamped return postal card containing the date of the retainer and the name of the client. The postal card will be signed by the clerk of the court and mailed to the attorney; and it will serve as a receipt for the filing of the statement of retainer.

\*\* If the action or claim arises from personal injuries or property damage, it shall also be stated whether or not the client was personally known to the attorney prior to the date of injury or property damage, the name and address of any person or persons who referred the client to the attorney or who had any connection with referring the client to the attorney, stating the connection. This shall be stated if the attorney was retained or associated in any way in five or more claims made or actions instituted in the previous calendar year for personal injuries, property damage or both.



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JAMES R. BROWNING, Clerk

IN THE

### Supreme Court of the United States October Term, 1960

No. 84

In the Matter of ALBERT MARTIN COHEN,

Petitioner,

DENIS M. HURLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE.

#### REPLY BRIEF FOR THE PETITIONER

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## Supreme Court of the United States

October Term, 1960

No. 84

In the Matter of Albert Martin Cohen,

Petitioner.

-v.-

DENIS M. HURLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE.

### REPLY BRIEF FOR THE PETITIONER

1.

Respondent has adduced no proof that Petitioner is unfit to practice law. In the absence of such proof, to disbar him denies him due process.

It would be well at the outset to clear away the underbrush of matters not in dispute here. Respondent in his Brief (Point I) argues at great length that, "Membership in the Bar is a privilege burdened with conditions," and that the State must have the power to strike from the rolls an attorney lacking in good character. Petitioner quarrels with none of this. He maintains only that the conditions imposed upon attorneys must not be arbitrary and that a disbarment proceeding must be conducted in accordance with the dictates of due process. And this much at least Respondent seems to concede.

What is at issue is whether the State has acted arbitrarily in disbarring Petitioner. Respondent maintains that an attorney who refuses to answer questions posed by a secret judicial inquiry ipso facto demonstrates his unfitness. According to Respondent, the reason for the refusal, the absence of any evidence of misconduct, the prior unblemished record of the refuser, and the context of the refusal are all irrelevant. The refusal alone is indelibly and unassailably damning. As Respondent's Brief (p. 10) puts it:

"The refusal of a lawyer to answer relevant questions, without more, constitutes a breach of those duties, and warrants the taking of disciplinary action against the lawyer."

This, Petitioner urges, is arbitrary.

In support of this position, Respondent cites People ex rel. Karlin v. Culkin, 248 N. Y. 465, and Matter of Rouss, 221 N. Y. 81. He cites Karlin no less than eight times and Rouss three times. Five times he quotes specific language from them. These cases are offered by Respondent to persuade this Court that it is proper to disbar an attorney for refusing to answer questions put to him by a judicial inquiry. Not once does Respondent even intimate that both decisions expressly recognize that an attorney's refusal

to answer questions in reliance on his privilege against selfincrimination stands on an entirely different footing from an unprivileged refusal.

In Karlin, where the attorney's refusal was not only unprivileged but contemptuous, Chief Judge Cardozo clearly stated that the court's concern was solely with a refusal to testify that had no basis in privilege. He said (248 N. Y. at 471):

"We are now asked to hold that when evil practices are rife to the dishonor of the profession, he may not be compelled by rule or order of the court, whose officer he is, to say what he knows of them, subject to-his claim of privilege if the answer will expose him to punishment for crime (Matter of Rouss, supra)." (Emphasis added)

It was in response to this contention of the recalcitrant attorney that Chief Judge Cardozo, in the language heavily relied upon by Respondent, stated that a refusal to answer should lead to expulsion. Notwithstanding the fact that the sentence quoted above appears in one of the very paragraphs from which Respondent quotes, his Brief would leave this Court with the impression that the Karlin case condemned a privileged refusal to testify.

Respondent's reliance on Rouss is equally disingenuous. Respondent has said in his Brief (p. 26) that Petitioner "... was disciplined for having refused to answer relevant questions in the judicial inquiry, such conduct having constituted a breach of the condition on which depended his privilege of membership in the Bar (Matter of Rouss, 221 N. Y. 81)..." Matter of Rouss did not even involve a refusal to testify. Rouss had testified at a criminal trial and

his disbarment followed upon the damaging statements he made in the course of his testimony.

Rouss does not merely fail to support Respondent. In addition, it flatly and unequivocally repudiates the very principle urged by Respondent: Writing for the court, Chief Judge Cardozo said therein (221 N. Y. at 90):

"Our decision in Matter of Kuffenburgh (188 N. Y. 49), is pressed upon us as controlling. But we think it is inapplicable. Kaffenburgh had refused to answer when called as a witness upon the trial of an indictment for conspiracy. He put his refusal on the ground that the answer would tend to criminate him. That was before the enactment of section 584 of the Penal Law. Disbarment proceedings were afterwards begun, and the charge was made that the refusal to answer was professional misconduct. That charge was not sustained either in the Appellate Division or in this court. Disbarment was ordered, but on other grounds. Much that was said was in reality unnecessary to the decision. There was no occasion to determine whether Kaffenburgh's refusal to testify was proper because it tended to expose him to a forfeiture of office. He had placed his refusal on the ground of a tendency to criminate him, and that of itself was sufficient to sustain him." (Emphasis added)

And it is the case of Matter of Rouss to which Chief Judge Cardozo approvingly referred in the sentence quoted above from People or rel. Karlin v. Culkin.

<sup>\*</sup> This section, if it had been in effect at the time Kaffenburgh was called to testify, would have granted him automatic immunity in return for his testimony. Similarly, in the instant case there was no statute whereby Petitioner would have received immunity in return for his testimony before the Inquiry.

Notwithstanding this clear affirmation of the principle that an attorney's refusal to answer questions in reliance on his privilege against self-incrimination does not constitute professional misconduct, Respondent, quoting out of context, urges Rouss and Karlin on this Court for the contrary principle.

Respondent does not claim that any other cases state or hold that an attorney's refusal to answer the Inquiry's questions, whatever the circumstances, whatever his character, whatever his reasons for refusing, ipso facto reveals him to be unfit to practice law. Nor does he seek to meet Petitioner's argument that such a position ignores the lesson of this Court's decisions in Schware v. Board of Bar Examiners, 353 U. S. 232, and Konigsberg v. State Bar of California, 353 U. S. 252 (See Petitioner's Main Brief at pp. 16-22). Indeed, one will look in vain for so much as a citation to the Konigsberg case in Respondent's Brief, although its pertinence is clear. Presumably, Respondent has no answer to the fact that this Court has twice held that a refusal to answer questions will not by itself support an inference of bad moral character or unfitness where the bar applicant's good character or fitness is otherwise unquestioned. The instant case is even stronger since here the petitioner has already demonstrated his fitness and good character in being admitted and practicing for thirty-seven years without a blot on his record.

Lacking any cases in support and unable to distinguish the previous decisions of this Court, Respondent relies in his Brief instead on the argument that Petitioner must be disbarred in order to protect the public. He says (pp. 17-18): "In licensing a person to practice the profession of the law, the court represents to society at large that here is an honorable man deserving of its trust and confidence—one who is worthy to uphold the honor of the profession and the dignity of the court. When the lawyer, as an officer of the court, refuses to give an accounting of his stewardship, and refuses to answer to the court for his professional practices, then the lawyer loses his 'good standing' as an instrument or agency to advance the ends of justice. (See Theard v. United States, 354 U. S. 278, 281.) Disbarment must follow because the court can no longer represent to the public that the lawyer is worthy of trust and confidence."

And what is it that makes Petitioner, a man with a distinguished record of public service and thirty-seven unblemished years at the bar unworthy of public trust? It is, says the Respondent, solely and exclusively that in secret proceedings, in the course of which he was warned that the Inquiry had "information that indicates your participation in professional misconduct," but was not permitted to know what that evidence was, where it came from or whether any efforts had been made to test its credibility, he relied on the advice of his counsel and asserted, as he concededly had a right to do, his privilege against self-incrimination. What prudent attorney would not have given the same advice in these circumstances, especially since the New York authorities before this case plainly

<sup>\*</sup> If Theard is cited for the proposition that the power to disbar exists to protect the public, citation was hardly necessary. The proposition is indisputable. If it is cited for the proposition that an attorney loses his good standing whenever he "refuses to answer to the court for his professional practices," the citation is plainly inappropriate. Theard has nothing to do with this problem.

supported the assumption of Petitioner and his counsel that he would be breaching no duty by so acting? (See Petitioner's Main Brief, p. 20). It is this refusal and this alone that Respondent says makes Petitioner unfit to continue the practice of the law.

It is worth remembering that Respondent's Brief admits that Petitioner has in the past provided considerable information to the authorities charged with overseeing attorneys. Indeed, Respondent claims that "practically every question" asked Petitioner was based upon information which he had himself made available (Respondent's Brief, p. 6). It was only when he was placed in the threatening environs of the Inquiry that he took refuge in his constitutional privilege. Even then many of Petitioner's refusals were based not on an unwillingness to aid the Inquiry but on the fear that to answer would waive his privilege (See, e.g., Record, p. 43). Respondent cannot now wrench those refusals out of context and use them to destroy a man whose whole professional career has been characterized by candor and fairness.

<sup>\*</sup> At the time of his questioning, Petitioner did not, of course, know what reckless charges might have been made against him by unseen informers. This is the first time that Respondent has intimated that there were none. But even now, as we shall show *infra*, there is good reason to doubt this belated disclaimer of Respondent.

Petitioner's refusal to answer the questions put to him by the inquiry does not prevent the State from obtaining the information that it seeks.

It has already been indicated that, by Respondent's own admission, Petitioner has provided the authorities with a substantial amount of information about his professional conduct. And in Petitioner's Main Brief (p. 25) it is pointed out that Petitioner's refusals do not leave Respondent impotent to obtain the information he seeks. Petitioner therein stated:

"The Inquiry's activities have been paralleled by a grand jury investigation into solicitation, conspiracy to solicit, and related misconduct by attorneys. The New York Courts have recently held that this same grand jury is empowered to grant immunity sufficiently to take the place of a witness' privilege against self-incrimination. In re Cioffi, [21 Misc. 2d 808, aff'd 10 A. D. 2d 425, aff'd N. Y. L. J., July 12, 1960, p. 6, col. 3]. Consequently, the State need only summon Potitioner before this grand jury to learn from him all that it desires to know."

Respondent says not so. Referring to the passage just quoted from Petitioner's Main Brief, Respondent's Brief (p. 30) states, "In aid of that proposition petitioner cites a case which completely demolishes his thesis, namely, the case of In re Cioffi. . ." Respondent then proceeds to describe how Cioffi and another attorney refused to testify before the grand jury even though they had been granted full immunity from criminal prosecution. Respondent concludes that, "Instead of obtaining the information he

sought, the District Attorney was blocked, as we were, by the attorneys' refusal to answer questions—a situation parallel to that of the instant case" (p. 31).

Respondent fails to point out that the attorneys' refusals in Cioffi persisted only until the New York Court of Appeals authoritatively ruled that the grand jury's grant of immunity was proper. Once that was established, Cioffi and the other attorney have testified before the grand jury and are continuing to do so. It is inconceivable that Respondent is unaware of this fact, since it occurred well before he submitted his Brief to this Court, and he states in his Brief (p. 31) that he "is personally familiar with all the facts" of Cioffi.

Even if the facts were otherwise and Respondent's statement of the Cioffi case were accurate, it is clear that once an attorney is granted full immunity, his refusal thereafter to testify would unquestionably be contemptuous and in bad faith. Such is not the case here. It is undisputed that Petitioner's privileged refusal to answer questions was neither contemptuous nor in bad faith. Indeed the Appellate Division which disbarred Petitioner stated in its opinion that Petitioner acted in good faith. In addition, Petitioner, unlike Cioffi, was never granted immunity nor indeed could immunity have been conferred in an inquiry of this sort under the pertinent immunity statute, New York Penal Law, §2447.

#### III.

Respondent's tactics have circumvented Petitioner's constitutional right to due process of law.

One shudders to think how many times it has been argued that law enforcement authorities cannot do their job if this Court wilfully persists in protecting the rights of individuals. That policemen may so believe, although lamentable, is not surprising. The attorneys should embrace this benighted view is shocking. And yet, unfortunately, Respondent has conducted the proceeding against Petitioner as though the summum bonum in our society was to "get" ambulance chasers, no matter what the cost in terms of individual liberties. And all this despite the absence of one shred of evidence that Petitioner has in fact engaged in unlawful solicitation!

This brief has already pointed out how Respondent, before this very Court, has cited and quoted authorities out of context and how he has inaccurately stated the pertinent facts about the Cioffi case. Petitioner will not dwell on Respondent's obvious attempt to prejudice this Court by his reference to the totally irrelevant fact that Petitioner's one-time law partner had been jailed for solicitation. It is sufficient to point out that subsequently Petitioner was appointed to the New York Domestic Relations Court which appointment received the endorsement of three prominent bar associations with knowledge of this fact (See Main Brief, p. 5). Perhaps Petitioner should count himself fortunate that Respondent has not called him a "Fifth Amendment ambulance chaser", although one of the briefs, amicus curiae, comes perilously close to doing just that.

(See Brief, Amicus Curiae, of the Co-ordinating Committee on Discipline, p. 21.)

But it is Respondent's overreaching below that is most serious. Nowhere does Respondent deny that if he prevails here, he will have found a superb device for evading procedural safeguards which this Court has long sought to preserve. As Petitioner said in his Main Brief (p. 31), "The new procedure will be simple: summon the person whose license to practice law is sought to be revoked; make vague threats about possessing adverse information so that the target will be moved to assert his privilege against self-incrimination; then revoke the license because the licensee has failed to cooperate with the investigation. In this way the inconvenience of presenting a case against 'the intended victim can safely be avoided." And, says Respondent in Point III of his Brief, so long as the perpetrator of this travesty is careful to give the victim notice of the date on which the inquisition is to be held, an opportunity to answer, sufficient warning that he is in a tight spot, and finally, a chance in the course of the ensuing disciplinary hearing to deny that he refused to answer, the requirements of due process are satisfied. It is of no moment, states Respondent, that this procedure deprives the accused of his right to a hearing on the charges of professional misconduct adverted to by his interrogator. It is irrelevant, says Respondent, that this technique leaves the evidence against the accused wholly undisclosed and unproved, the witnesses against him being thus insulated from revealing cross-examination.

In Petitioner's Main Brief, it is stated (p. 31): "That this is not an overdrawn picture of what occurred below is

best indicated by respondent's statement in his brief (p. 20) before the Appellate Division that it as cheaper and quicker to proceed in this manner than to incur the 'expenditure of time, energy and money' that would be necessary to make a case of professional misconduct against the petitioner."

Respondent has given further evidence in his Brief in this Court that the technique described above is not an exaggeration. Until receiving Respondent's Brief, Petitioner had assumed, however unreliable that information might be, that at least Respondent was sincere when he told Petitioner in the course of the Inquiry that, ". . . we have information that indicates your participation in professional misconduct . . . " Now for the first time, Respondent suggests that the adverse information was inconsequential. He says that Petitioner was not being asked to meet un? disclosed information from unknown sources, that in fact, "The prime source of information as to petitioner's activities was his own Statements of Retainer filed by him with the Appellate Division" (Respondent's Brief, p. 11). At another point, Respondent says, "Actually, the record discloses that practically every question asked petitioner had its basis in his own Statements filed with the court" (Id., p. 6) (Emphasis added).

Petitioner does not, of course, claim to know whether Respondent does or does not have information indicating his participation in professional misconduct. Petitioner had assumed until now that because Respondent said he did, he did. And Petitioner is bound to admit that although Respondent seems to suggest above that there were no unseen informers, at other points he gives exactly the oppo-

site impression. Thus, in Respondent's Brief (pp. 7, 32), he emphasizes the fact that "specific persons were named when petitioner was being examined" (Emphasis in the original). If this is intended, as it seems to be, to convey the impression that Respondent had at least named Petitioner's accusers, then Respondent is again misrepresenting the facts. Nowhere were the many persons referred to in Respondent's questions at the Inquiry identified as informers. In sum, Respondent's position now seems to be that Petitioner was not being called upon to meet evidence given by unseen informers because: (1) there were no informers against him; and (2) these non-existent informers were in fact identified.

Petitioner does not mean to suggest that Respondent deliberately set out here to subvert Petitioner's constitutional rights. Petitioner does mean to suggest that Respondent has been reckless of those rights and that the nature of the proceedings he has chosen to employ permit, indeed facilitate exactly that kind of recklessness. In this connection, it is not amiss to point out that although Respondent claims that the State desperately needed the answers to the questions asked of Petitioner, it is clear from the Record that Respondent plainly had much of the information he claimed to be seeking from Petitioner.

### IV.

This Court's decisions in cases involving public employees are not pertinent to a determination of the rights of a private citizen to pursue his profession.

In attempting to answer Petitioner's contention that cases involving the dismissal of public employees cannot validly be invoked where, as here, the issue concerns the permanent revocation of a private citizen's license to pursue his profession (Petitioner's Main Brief, Point III), Respondent's Brief states (p. 26):

"Can it rationally be said that the duty of an attorney vis-a-vis the court which admitted him and is chargeable with control over his professional conduct, is any less sacred than the duty to the public employer of a subway conductor (the Lerner case), a teacher (the Beilan case), or a policeman (the Christal case)? Is not the duty of the lawyer higher than any of these non-lawyers? And, is the public interest any less vital in the case of the attorney?

In the ultimate, the fundamental principle is the same, namely, that he who refuses to answer when, in the public interest, it is his duty to speak, must bear the consequences."

Respondent's questions completely miss the point. The State may fire a subway conductor for refusing to answer questions relevant to his employment not because the conductor has a "sacred" duty to be candid with his employer, but because an employer, even a public employer, may impose all sorts of limitations upon its employees that the State may not impose upon private citizens, even those holding licenses from the State. Petitioner's Main Brief (p.

35) supplies a number of examples. Under Respondent's "sacred" duty analysis, it would seem to follow that anything the State may demand of its employees, it may demand of attorneys and other licensees. And this is plainly not so.

All that Lerner, Beilan and Christal prove is that the State could fire from its payroll any State-employed attorney who refused to answer questions put to him by his superiors. They do not mean that that same attorney can be banished from the profession. Petitioner's view of the inapplicability of the public employee cases is firmly supported by decisions of the highest courts of the states of Florida, Illinois, Massachusetts, and before the instant case, even of New York. See Petitioner's Main Brief, pp. 36-39. Significantly, Respondent makes no effort to distinguish any of these authorities which clearly reject his position: Thus in Florida v. Sheiner, 112 So. 2d 571, the Supreme Court of Florida reaffirmed an earlier holding (82 So. 2d 657) that it was a denial of due process to disbar an attorney for refusing to testify in reliance on his constitutional privilege against self-incrimination, although the applicability of the public employees cases (Beilan and Lerner) was urged upon the court. Again, in In re Holland, 377 Ill. 346, 36 N.E. 2d 543, the Supreme Court of Illinois, in holding that the suspension of an attorney for assertion of the privilege constituted error, rejected the attempted analogy between the policeman (Christal) and the lawyer. Indeed, in Matter of Ellis, 282 N. Y. 435, 26 N.E. 2d 967, a unanimous New York Court of Appeals held that an attorney could not be disbarred for refusing to waive his coustitutional privilege against self-incrimination, even though its own decision in Cantelline v. McClellan, 282 N. Y. 166,

25 N.E. 2d 972, then but a few weeks old, upholding the discharge of a policeman for the very same conduct was urged upon it in the identical argument that Respondent makes herein (See Petitioner's Main Brief, p. 38).

The difference between the public employee and the licensee is demonstrated most dramatically in the Opinion of the Justices, 332 Mass. 763, 126 N.E. 2d 100. There the Supreme Judicial Court of Massachusetts, having earlier held that teachers could constitutionally be barred from public employment for refusing to testify in reliance on their privilege against self-incrimination, held that they could not constitutionally be barred from private employment as teachers. The court regarded the distinction between public and private employment as "obvious", as it must be, especially to the court that uttered the muchquoted, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. New Bedford, 155 Mass. 216. Thus the inapplicability of the string of cases involving public employees cited in Respondent's Brief, p. 11 is clearly demonstrated.

In the face of this mass of opposing authority cited by Petitioner, Respondent presses upon this Court his conception of "the public interest." Although the Supreme Judicial Court of Massachusetts has said that it is not in the public interest to force private school teachers to give up their constitutional rights if they would teach the young, although the Supreme Courts of Illinois and Florida, and even at one time the Court of Appeals of New York have said that it is not in the public interest to make attorneys trade their constitutional rights for the right to practice,

Respondent would have it otherwise. According to him, "It matters not whether the relationship is one of public employment so long as the 'public interest' is involved" (Respondent's Brief, p. 25).

On Respondent's analysis, then, Lerner v. Casey, turns on the fact not that Lerner was a public employee, but that the public has a vital interest in the disclosures of a subway worker. If this is the meaning of Lerner v. Casey, who is safe from the inquisitorial process? Is there any line of endeavor that does not impinge upon the "public interest" as much as that of a subway worker? Under Respondent's analysis, virtually anyone can be denied the right to pursue his life's calling if he refuses to answer the State's questions, no matter what the reason for his refusal and no matter what the context.

This case is obviously not the first in which a prosecutor has identified the trapping of his quarry with the public interest. Fortunately, Courts do have broader vision. Respondent has, of course, misconceived the true public interest. That interest is served by fair procedures, procedures that permit attorneys to be "unintimidated—free to think, speak and act as members of an independent Bar." Konigaberg v. State Bar of California, 353 U. S. 252, 273. See also Cammer v. United States, 350 U. S. 399, 406-07. The cherished ideal of an independent Bar would be unattainable if attorneys were as vulnerable to State power as public employees.

<sup>\*</sup> This was not, it should be added, the view of New York's representatives in the Lerner case itself. The brief filed in behalf of Casey distinguished this Court's decision in Konigsberg by pointing out that no "employer-employee" relationship existed in Konigsberg. See Appellee's Brief therein, p. 19.

#### V.

A refutation of arguments advanced in the Brief, Amicus Curiae, of the Co-ordinating Committee on Discipline.

For the most part, the Brief, Amicus Curiae, of the Coordinating Committee follows the lines of argument advanced by Respondent. However, at pp. 19-21, it advances arguments not made by Respondent that should be disposed of.

#### The pertinence of the Konigsberg, Schware and Anastoplo cases.

The Co-ordinating Committee seeks to distinguish the instant case from the problems presented by Konigsberg, Anastoplo and Schware, on three grounds. First, those cases deal with political beliefs, whereas this one does not. Second, "Konigsberg, Anastoplo and Schware deal with alleged arbitrary refusals of admission to the Bar while Petitioner's case deals with a Judicial Inquiry, not arbitrarily conducted, into Petitioner's continued fitness to practice in view of his lack of candor with the Court as regards the subject of improper handling of personal injury cases." And, third, "Significantly a search of the records in the Konigsberg, Anastoplo and Schware cases indicates that none of the Petitioners in those cases took the privilege against self-incrimination."

To take the arguments in the reverse order, Petitioner agrees that the fact that his refusal was privileged, whereas those of Kenigsberg and Anastoplo were not, is significant. He has suggested before that if the Bar authorities in

California and Illinois cannot rationally infer unfitness from Konigsberg's and Anastoplo's unprivileged refusals, it must follow, a fortiori, that the New York authorities cannot rationally infer unfitness from Petitioner's privileged refusal. That is to say, it follows, unless an assertion of the privilege against self-incrimination is to be taken as evidence of Petitioner's guilt, something that both Respondent and the courts below vigorously deny having done.

The Co-ordinating Committee's second argument, Petitioner frankly admits, he does not understand. If the Co-ordinating Committee is suggesting that Petitioner's case is weaker because he was already a member of the Bar in good standing with a long unblemished record behind him, whereas Anastoplo, Konigsberg and Schware are applicants for admission, reason and authority are unequivocally opposed to such a suggestion (See Petitioner's Main Brief, pp. 18-19). Is the Co-ordinating Committee saying that the other cases deal with alleged arbitrary refusals to admit, whereas this case deals only with a properly conducted Inquiry! If this case ended with the Inquiry, it would not be before this Court. But it did not end there. It went on to an arbitrary refusal to permit Petitioner to continue to practice law.

Finally, Petitioner fails to see how the fact that this case does not deal with political beliefs is important. Is there a doubt in the world that if New York may disbar Petitioner, it may disbar an attorney who refuses in reliance upon his privilege against self-incrimination to answer questions concerning whether he is a communist, anarchist or fascist? Is it not even more important to remove

alleged subversives from positions of public trust than alleged ambulance thasers? Would not a refusal to answer such questions be just as much a "lack of candor" as Petitioner's refusals! The proof of the essential identity between the instant case and a case involving alleged subversives lies completely and irrefutably in the fact that the very cases upon which Respondent relies most heavilythe public employee cases-involved exactly the kind of political inquiries now claimed to be unaffected by what happens to Petitioner. In fact, in Florida the Bar authorities attempted to disbar an attorney for a privileged refusal concerning his political beliefs. The American Bar Association therein (also Amicus herein) strongly urged disbarment, failing to see the distinction attempted here by the Co-ordinating Committee. Twice the Supreme Court of Florida refused to disbar, holding as Petitioner herein contends, that'this would be a clear denial of due process. See Sheiner v. Florida, 82 So. 2d 657; Florida v. Sheiner, 112 So. 2d 571. The court significantly noted in Sheiner, that proof of the attorney's membership in the Communist Party would constitute professional misconduct, but. steadfastly held that disbarment on the basis of his privileged refusal without more denied the attorney due process.

## The "threatening" of Petitioner with undisclosed evidence.

The Co-ordinating Committee maintains, first, that Petitioner was not "threatened in any way" during the Inquiry and that, "This particular claim is here made for the first time, and was not made below."

Petitioner does not wish to quarrel with the Co-ordinating Committee over how Respondent's statement that, "... we have information that indicates your participation in professional misconduct ... "should be characterized. It appeared, and naturally it would seem, threatening to Petitioner.

With respect to the claim that the point was not raised below, it is only necessary to quote the following passages from Petitioner's Brief before the New York Court of Appeals:

"If there is any evidence of professional misconduct by appellant, the fair way to proceed is to institute disciplinary proceedings on the basis of that evidence. That is a very different procedure from summoning appellant to a secret inquiry, presenting no charges, informing him that there is evidence against him, but not telling him what it is, thereafter depriving him of his livelihood because he failed to give testimony that may tend to incriminate him. Can appellant possibly be blamed for keeping silent under such circumstances?" (p. 22)

"However, at the inquiry appellant was for the first time informed that the inquiry had information indicating misconduct on his part . . . and the line of questioning to which appellant was subjected belied the disclaimer that appellant had not been summoned as a target of the inquiry " (pp. 51-32).

"Respondent would thus have found a convenient device by which to avoid the necessity of proving substantive charges of professional misconduct at a hearing at which it would have the burden of proof. It need only summon an attorney to a preliminary investigation, require him to submit to interrogation, and merely because he insists that

respondent produce the unseen accusers so that their veracity may be put to the test by confrontation and cross-examination, proceed to disbar him." (p. 35)

#### Fifth Amendment ambulance chasing.

. The Co-ordinating Committee Brief (p. 21) states:

"No lawyer will be heard to suggest seriously that the price of 'fearless advocacy' is a constitutionally protected right to solicit personal injury claims, 'chase ambulances', bribe police officers and ambulance attendants, breach the Canons of Ethics and violate the Penal Law of the State of New, free from disciplinary limits or supervision."

For the benefit of the Co-ordinating Committee, Petitioner will say again that not a scintilla of evidence that he has done any of the things listed has yet been presented or proven, unless, of course, one takes his assertion of the privilege against self-incrimination as a confession of guilt. And, once again, that is what Respondent and the courts below have said they have not done.

## The effect on the Bar if this Court holds New York's action here unconstitutional

Finally, the Co-ordinating Committee, like Respondent, sees the Bar 'headed downward at a precipitous rate'' (p. 23) if a man who asserts and defends a constitutional privilege is permitted to remain in the profession. Petitioner has already responded to this extravagant prediction, but it seems appropriate to cite the Co-ordinating Committee's own Brief (p. 38), by way of supplying the answer: "We need the cooperation of those we call on. We may not get it at all times. It only means that we have to

work a little harder, a little longer." A small price to pay for the preservation of fundamental constitutional liberties.

Two other items should not be left unanswered.

- 1. The Co-ordinating Committee, as does the Respondent, refers to the fact, irrelevant here, that Petitioner's one-time law partner was jailed for solicitation in 1955 (pp. 9-10). Petitioner fails to see the reason for this, unless it is aimed at prejudicing this Court through some theory of guilt by association. It is sufficient to point out that in 1958, with knowledge of this fact, the Association of the Bar of the City of New York and the New York County Lawyers Association, two of the three creators of the Co-ordinating Committee, endorsed Petitioner as fit to serve as Judge of the Domestic Relations Court.
- 2. The Co-ordinating Committee refers in its Brief (p. 16) to the case of Matter of Nathaniel Cohen, 115 App. Div. 900 (1st Dept.) in support of the proposition that where

<sup>\*</sup> The Co-ordinating Committee Brief (p. 14) refers also to the "McCormick" Retainer annexed to Respondent's Brief, and states that Rothenberg's name appears therein "as the referrer of the client to Petitioner, although Rothenberg was in jail at the time of the claimed referral." Again, the reason for the inclusion of this item is unclear. Respondent concedes that the sole ground for disbarment was Petitioner's refusal to testify and that no proof of professional misconduct was adduced against him at a disciplinary proceeding, thus this item is clearly irrelevant. In addition, if the Coordinating Committe intends to give this Court the impression that Petitioner lied as to the identity of the referrer because Rothenberg was in jail at the time, it appears from Respondent's Brief (p. 8), although outside the Record, that McCormick was a prison guard. Again, these references in both Briefs are clearly irrelevant and it can only be supposed that the sole motive for their inclusion was to prejudice this Court and obfuscate the actual fact that there was no evidence ever proven against Petitioner of professional misconfluct and that the sole ground for disbarment was his privileged. refusal to testify...

the facts are undisputed there need be no hearing. Thus the Brief quotes from the case as follows:

"Upon this application to disbar the respondent, Nathaniel Cohen, we have reached the conclusion that as the facts are undisputed, we should dispose of the question presented without a reference."

In view of the fact that the opinion in that case was not published, it is surprising that the Co-ordinating Committee fails to inform this Court, that the issue before the court in that case was identical to the one presented herein, but that unlike the courts below, in that case the court held that an attorney's refusal to testify in reliance on his privilege against self-incrimination was not professional misconduct since the privilege is "as available to a lawyer as to a layman", and its invocation cannot support a disbarment.

#### CONCLUSION

When all is said and done, this Court must decide whether the State can, consonant with due process, permanently deprive an individual of the right to practice his profession, although not a scintilla of evidence has been presented to impeach his good moral character, solely because he has refused to testify at a secret investigation in reliance ingood faith on his privilege against self-incrimination.

Respondent has suggested that Petitioner misunderstands the nature of the decision below. He says: "In this Court, as in the New York State courts, petitioner persists in asserting that he was disciplined for invoking his constitutional privilege against self-incrimination." Respondent's Brief (p. 22). Respondent reminds Petitioner that it is not Petitioner's reliance on his privilege that hat st him his right to practice, but his refusal, "without more, to answer relevant questions posed by a state judicial inquiry . . . " (Id. p. 21).

It is precisely this principle that Petitioner is attacking. Respondent and the courts below have failed to recognize that the context of the refusal cannot be disregarded, that a refusal to testify in admittedly good faith reliance on one's privilege against self-incrimination is not the same as a contemptuous refusal to testify. As Petitioner demonstrated in his Main Brief (pp. 22-23), there are many situations in which a refusal to testify is not only defensible, but the only rational course to pursue. And so it was here.

Thus, Petitioner differs not at all with Respondent over what the courts below held. He differs only in believing those holdings to be arbitrary in that they treat alike contemptuous refusals and privileged refusals, refusers whose character has not been impeached and those against whom evidence has been adduced, refusals in secret inquisitorial proceedings and refusals in proceedings where the right of confrontation, cross-examination and other procedural safeguards exist.

The State's power to bar a man from his chosen profession for the rest of his life is an awesome power. This power cannot be wielded in disregard of basic constitutional rights. A breach of the dike here will inevitably produce the flood that drowns individual rights in "the public interest," a term used repeatedly by Respondent to justify his tactics in this case. As Professor Gellhorn has so persuasively put it, "The incautious discarding of one constitutional protection cheapens others as well, for the erosion of values

is a process not easy to halt. Gellhorn, Individual Freedom and Governmental Restraints, pp. 139-40.

This Court stated many years ago in Ex Parte Robinson, 19 Wall, 505, 512:

"Before judgment disbarring a lawyer is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. The principle that there must be citation before hearing, and hearing or opportunity to be heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

Respondent's tactics herein and the resultant disbarment of the Petitioner make a mockery of the noble passage by this Court quoted above.

Dated: October 29, 1960.

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## SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term. 1960.

Denis M. Hurley.

Albert Martin Cohen, Petitioner, On Writ of Certiorari to the Court of Appeals of the State of New York:

[April 24, 1961.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

We are called upon to decide whether the State of New York may, consistently with the Fourteenth Amendment. disbar an attorney who, relying on his state privilege against self-incrimination, has refused to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct.1

The issue arises in the context of the so-called Brooklyn "ambulance chasing" Judicial Inquiry which this Court had before it in Anonymous v. Baker, 360 U.S. 287. -The origins, authority, and nature of the Inquiry have already been sufficiently described in our opinion in that case:

N. Y. Const., Art. I, § 6. While petitioner, at his appearance before the investigating authority, also claimed a federal privilege not to testify, in his later response to the petition initiating disciplinary. proceedings he relied solely upon "the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under Article I Section 6 of the New York State Constitution." It is of course settled that a Fifth Amendment privilege was not available to petitioner in the present case. See, e. g., Knapp v. Schweitzer, 357 U. S. 371; Lerner v. Casey, 357 U. S. 468, 478. Nor do we understand it to be contended that the Fourteenth Amendment automatically precluded the State from exacting petitioner's testimony and attaching consequences to his refusal to respond. Cf. Adamson v. California, 332 U.S. 46, 54; Palko v. Connecticut, 302 U. S. 319, 323-324; Twining v. New Jersey, 211 U/S. 78, 110-114. We take the petitioner's position and the remittitur of the Court of Appeals as presenting under the Fourtenth Amendment only a broad claim of fundamental unfairness

There need only be added here that the purpose of the Inquiry, as reflected in the establishing order of the Appellate Division of the Supreme Court of the State of New York, Second Department, was twofold: "to expose all the evil practices [involved in the improper solicitation and handling of contingent-retainers in personal injury cases] with a view to enabling this court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them." 9 A. D. 2d 436, 437.

For some years the Second Department has had a court rule "which requires that an attorney who makes contingent-fee agreements for his services in personal injury. wrongful death, property damage, and certain other kinds of cases, must file such agreements with the [Appellate Division] and, if he enters into five or more such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained" (called "Statements of Retainer"). 7 N. Y. 2d 488, 493; see Rule 3 of the Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department, Clevenger's Practice Manual, p. 21-19 Principally as a result of the large number of Statements of Retainer filed by him during recent years. petitioner was called to testify and produce records before the Justice in charge of the Inquiry.2 Relying on his concededly available state privilege against self-incrimination, petitioner refused to produce the records called for

The following quotation from the respondent's brief accurately reflects the record:

<sup>&</sup>quot;During the period 1954 to 1958, inclusive, pursuant to the provisions of said Rule, petitioner, a specialist in negligence cases, filed 228 statements as to retainer in his own name. In addition, 76 such statements were filed in the firm name of Cohen & Rothenberg, thus indicating that petitioner and his law firm had been retained on a contingent basis in a total of 304 negligence cases in, five years (R. 33-35). The inquiry therefore deemed it advisable to call petitioner as one of its witnesses."

and to answer some sixty other questions. The subject matter of such questions was summarized by the New York Court of Appeals in its opinion in this case (7 N. Y. 2d 488, 494), as follows:

". . . Those unanswered questions related to the identity of his law office partners, associates and employees, to his possession of the records of the cases described in his statemen's of retainer, to any destruction of such records; to his bank accounts, to his paying police officers or others for referring claimants to him, to his paying insurance company employees for referring cases to him, and to his promising to pay to any 'lay person' 10% of recoveries or settlements. He was asked-and refused to answer-as to whether he had made or agreed to make such payments to any of several named persons, as to whether he had hired or paid non-lawyers to arrange settlements of his case with insurance companies and as to whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-a and 270-d of the Penal Law which forbid the solicitation of legal business or the employment of lawyers of such solicitors. . . ."

After petitioner had refused to answer these questions, counsel for the Inquiry warned him that "serious consequences," in the form of an exercise of the Appellate Division's disciplinary power over attorneys practicing before it, might flow from his refusal to respond, even though that refusal was based on a claim of privilege. As the basis for his warning counsel referred to various provisions of the Canons of Professional Ethics and of the

<sup>&#</sup>x27;s Section 90 of the New York Judiciary Law.

when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers.

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New York Penal Law. Petitioner was then given a further opportunity to respond to the unanswered questions, but he declined, preferring to rely upon his claim of privilege.

Thereafter the Justice in charge of the Inquiry recommended to the Appellate Division that petitioner be disciplined. The Appellate Division ordered respondent Hurley to fle a petition for disciplinary action. The ensuing petition sought petitioner's disbarment, alleging as grounds therefor:

"The refusal of . . . Albert Martin Cohen, to produce the records [called for by the Inquiry], and his refusal to answer the questions [summarized above], are in disregard of and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt [sic] the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusais respondent withheld yital information bearing upon

knowing of such practices to inform the court thereof, Canon 34 outlawing division of fees except with other lawyers : . . . . . . . . . . 7 N. Y. 2d 488, 494. Canons 29 and 34 of the New York Canons of Professional Ethics are found in McKinney N. Y. Laws, Judiciary Law, pp. 774-775. Canons 22 and 28 are found in the 1959 "pocket part," at pp. 210-211. They are similar in all respects to the correspondingly numbered Canons of Professional Ethics of the American Bar Association.

<sup>&</sup>lt;sup>5</sup> N. Y. Pen, Law §§ 270-a, 270-c, 270-d, 276, ".ll relating to soliciting and fee splitting." 7 N. Y. 2d 488, 494.

his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession . . . . "

The Appellate Division ordered petitioner disbarred saying (9 A. D. 2d, 448, 449):

"To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar."

The New York Court of Appeals affirmed, Judge Fuld dissenting. 7 N. Y. 2d 488. We granted certiorari because the case presented still another variant of the issues arising in the *Konigsberg* and *Anastaplo* cases. Ante, pp. —, —.

Starting from the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law, Konigsberg v. State Bar of California, 353 U. S. 252; Schware v. Board of Bar Examiners, 353 U. S. 232, petitioner's claim that New York's disbarment of him was capricious rests essentially on two propositions:

(1) that the Fourteenth Amendment forbade the State from making his refusal to answer the Inquiry's questions a per se ground for disbarment; (2) that in any event such a ground is not permissible when refusal to answer rests on a bona fide claim of a privilege against self-incrimination.

<sup>&</sup>lt;sup>6</sup> Judge Fuld dissented on state constitutional grounds, reaching no tederal questions.

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The first contention must be rejected largely in light of our today's opinions in the Konigsberg and Anastaplo cases, ante, pp. —, —. The fact that such refusal was here made a ground for disbarment, rather than for denial of admission to the bar, as in Konigsberg and Anastaplo, is not of constitutional moment. And there is no claim here either that the unanswered questions were not material or that petitioner was not duly warned of the consequences of his refusal to answer. By the same token those cases also dispose of petitioner's basically similar contention that the State could proceed against him only by way of independent evidence of wrongdoing on his part.

We do not think it can be seriously contended that New . York's judicial inquiry was so devoid of rational justification that the mere act of compelling even unprivileged testimony was a deprivation of petitioner's liberty without due process. History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long-established, but the subject matter of the present investigation does not lack a rational basis." It is no less true than trite that lawyers must operate in a three-fold capacity, as selfemployed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too

much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the "payment of awards to persons bringing in legal business" is inconsistent with the personally disinterested position a lawyer should maintain.

Finally, it cannot, by any stretch be considered that New York acted arbitrarily or irrationally in applying the disciplinary sanction of disbarment to the petitioner. What Mr. Justice Cardozo (then Chief Judge of the New York Court of Appeals) said in the Karlin case is enough to put an end to that contention:

"If a barrister was suspected of misconduct, the benchers of his inn might inquire of his behaviour. We can hardly doubt that refusal to answer would have been followed by expulsion. There was thus little occasion for controversies as to discipline to be brought before the judges unless the benchers failed in the performance of their duties. In case they did fail a supervisory power was ever in reserve. The inns ... were subject ... to visitation by the judges ... Short shrift would there have been for the barrister who refused to make answer as to his professional behavior in defiance of the visitors." 248 N. Y., at 472-473.

If more than long-lived practice is thought necessary to justify such a sanction, it is to be found in the fact that the denial of continued access to a position that can be misused is permissible to assure that the position may not be held without observance of the obligations lawfully imposed upon it. Revocation of a license for failure to fulfill similar obligations of a licensee is the very sanction which the Federal Government has adopted in a number of situations. See, 12 U. S. C. § 481, 47 U. S. C. §§ 308 (b), 312 (a) 4.

#### COHEN v. HURLEY

II.

A different constitutional conclusion does not result from the fact that petitioner's refusal was based on a good-faith assertion of his state privilege against self-incrimination. Because, from a federal standpoint, there can be no doubt that a State has great leeway in defining the reach of its own privilege against self-incrimination, we regard the scope of federal review here as being limited to the question whether arbitrary or discriminatory state action can be found in the consequences New York has attached to the exercise of the privilege in this instance.

Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicated not upon any unfavorable inference which it drew from petitioner's assertion of the privilege, cf. Slochower v. Board of Higher Education, 350 U. S. 551, 557-558; Grunewald v. United States, 353 U. S. 391, 421, nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawver, he owed to the court. The Court of Appeals stated:

Of course. [petitioner] had the right to assert the privilege and to withhold the incriminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his immunity. . . But the question still remained as to whether he had broken the 'condition' on which depended the 'privilege" of membership in the Bar. . . 'Whenever the condition is broken, the privilege is lost' [citing Matter of Rouss, 221 N. Y. 81, 84–85, Cardozo, J.]. Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was 'an officer of the court, and like the court itself, an instru-

ment . . . of justice' [citing People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470-471, Cardozo, J.], with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to cooperate. 'Such 'co-operation' is a 'phrase without reality' as Chief Judge Cardozo wrote in People ex rel. Karlin v. Culkin (supra, p. 471) if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court." 7 N. Y. 2d, at 495.

We do not think that it can be seriously contended that the unavailability of the state privilege in judicial inquiries of this type amounts to a distinction from criminal prosecutions so irrational as to suggest either a denial of due process or a purposeful discrimination of the kind which violates the Equal Protection Clause of the Fourteenth Amendment. A State may rationally conclude that the consequence of disbarment is less drastic than that of a prison term for contempt, albeit arguments to the contrary can be made as well. It may also rationally conclude that procedures resulting in greater preventive certainty are warranted when what is involved is the right to continue to occupy a position affording special opportunities for deleterious conduct-opportunities, indeed, created by the State's original certifit cation of the petitioner's merit: In this regard all that New York has in effect held is that petitioner, by resort to a privilege against self-incrimination, can no more claim a right not to be disbarred for his refusal to answer with respect to matters within the competence of the Court's supervisory powers over members of the bar, than could a trustee claim a right not to be removed from office for failure to render accounts which might incriminate him. Finally, where illegal or shady practices on the part of some lawyers are suspected, New York could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could miscreants only be dealt with through ordinary investigatory and prosecutorial processes. "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work." People ex rel. Karlin v. Culkin, 248 N. Y. 465, 480 (Cardozo, J.).

These bases for affording a procedure in such judicial inquiries different from that in criminal prosecutions are more than enough to make wholly untenable a contention that there has here been either a denial of due process or of equal protection.

Although what has already been said disposes of this case, we take note, in conclusion, of two further considerations. First, it is suggested that the Fourteenth Amendment gave petitioner a federal constitutional right not to be required to incriminate himself in the state proceedings (although, apart from his claim of fundamental unfairness, the petitioner himself does not so contend, Note 1, supra). That proposition, however, was explicitly rejected by this Court, upon the fullest consideration, more than fifty years ago, Twining v. New, Jersey, 211 U. S. 78, and such has been the position of

The Even if the historial meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle

the Court ever since.\* See Snyder v. Massachusetts, 291 U. S. 97.° Brown v. Mississippi, 297 U. S. 278, 285; Palko v. Connecticut, 302 U. S. 319, 323–324; Adamson v. California, 332 U. S. 46; <sup>10</sup> Knapp v. Schweitzer, 357 U. S. 371, 374. This is not to say, of course, that States have free rein either in the choice of means of forcing incriminatory testimony, or in the drawing of inferences from

of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There . seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. . . . " 211 U.S., at 113-114.

\* Hence, if any "constitutional privilege against self-incrimination" has here been made a "'phrase without reality" it can only have been a state privilege which this Court does not have jurisdiction to protect.

"The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." 291 U.S., at 105.

10 "California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. : . . That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment." 332 U.S., at 54-55.

a refusal to testify on grounds of possible self-incrimination, no matter how objectionable or irrational. But these decisions do establish, at the very least, that to make out a violation of the Fourteenth Amendment, something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony.

It is, however, suggested that such additional factors are to be found in New York's assertion of a power to grant a state privilege against self-incrimination without including within its sweep protection from disbarment of a lawyer who asserts this privilege during a judicial inquiry into his professional conduct. It is said that this gives rise to a pernicious doctrine whereby lawyers "may be separated into a special group upon which special burdens can be imposed even though such burdens are not and cannot be placed upon other groups."

This argument wholly misconceives the issue and what the Court has held respecting it. The issue is not, of course, whether lawyers are entitled to due process of law in matters of this kind, but, rather, what process is constitutionally due them in such circumstances. We do not hold that lawyers, because of their special status in society, can therefore be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and that history is surely relevant to these inquiries. State banks may be sub-

<sup>&</sup>quot;Of course it is not alone the early beginning of the practice of judicial inquiry into attorney practices which is significant upon the reasonableness of what transpired here. Rather it is the long life of that mode of procedure which bears upon that issue, in much the same way that a strong consensus of views in the States is relevant

jected to periodic examinations that would violate the rights of some other kinds of business against unreasonable search and seizure. Compare 12 U. S. C. § 481 with Boud v. United States. 116 U.S. 616. A state contractor can be deprived of even the rudiments of a hearing on the issue of whether the state executive department is contracting in accordance with applicable state law. Perkins v. Lukens Steel Co., 310 U. S. 113. 'The "right" to judicial review of agency determinations can be taken away from railroad employees in one situation but guaranteed to professional employees in other situations. Compare Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, with Leedom v. Kune, 338 U.S. 184. A state employee need no longer be entrusted with government property if he refuses to. explain what has become of property with which he is charged though his refusal may be protected against a contempt sanction by a state or federal privilege against self-incrimination. Cf. Lerner v. Casey, 357 U. S. 468.

Clearly enough, factual distinctions are the determinative consideration upon the question of what process is due in each of these cases. Otherwise making state pro-

to a finding of fundamental unfairness. What is significant is that the practice we are now concerned with has survived the centuries which have seen the fall of all those iniquitous standards of which we are reminded, and which, incidentally, would be equally unconstitutional today if applied after a full criminal-type investigation and trial. While recognizing that the test was not exclusive, this Court stated many years ago:

<sup>&</sup>quot;First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in Murray v. Hoboken Land Co., 18 How. 272, 280. . . ." Twining v. New Jersey, supra, at 78, 100.

cedures vary solely on the basis of the given occupation would indeed be nothing less than a denial of equal protection to bankers, contractors, railroad employees, and government employees. On the basis of the factual distinctions that we have mentioned above, we consider that a State can constitutionally afford a different procedure—the present procedure—in these judicial investigations from that in criminal prosecutions.

Petitioner's disbarment is not constitutionally infirm, and the Court of Appeals' order must be

Affirmed.

# SUPREME COURT OF THE UNITED STATES

No. 84. - OCTOBER TERM, 1960.

Albert Martin Cohen, Petitioner,

Denis M. Hurley.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[April 24, 1961.]

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

We are once again called upon to consider the constitutionality of penalties imposed upon lawyers who refuse to testify before a secret inquiry being conducted by the State of New York into suspected unethical practices among members of the legal profession in and around New York City. In Anonymous v. Baker, a majority of this Court upheld the power of New York to conduct such a secret inquiry. Here, the majority upholds the disbarment of petitioner, a New York lawyer for thirtynine years, solely because, in reliance upon an assertion of his constitutional privilege against self-incrimination, he refused to testify before that inquiry. The theory upon which this order of disbarment was upheld by the New York Court of Appeals—a theory which the majority here embraces-is that although lawvers, as citizens, have 'a constitutional right not to incriminate themselves, they also have a special duty; as lawyers, to cooperate with the courts and that this "duty of co-operation" would become

<sup>1360</sup> U.S. 287. The majority there held that witnesses before the inquiry could constitutionally be deprived of a public hearing and the assistance of counsel. But cf. Chambers v. Florida, 309 U.S. 227, 237: "The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes."

a "'phrase without reality' if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court." In my judgment, however, the majority is here approving a practice that makes the constitutional privilege against self-incrimination the "phrase without reality."

This almost magical obliteration of the privilege against self-incrimination represents a radical departure from the previously established practice in the State of New York. For as pointed out in the dissent of Judge Fuld, the New York Court of Appeals had earlier condemned an attempt to introduce precisely the policy it here accepted, saying: "The constitutional privilege [not to incriminate one's self] is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court." It follows that the present disciplinary proceeding instituted against the appellant, wherein the single offense

<sup>\*</sup> Matter of Cohen. 7 N. Y. 2d 488, 495

<sup>&#</sup>x27;In my judgment, petitioner's reliance upon his federal privilege against self-incrimination under the Fifth and Fourteenth Amendments is sufficiently shown by this whole record to require the conderation of that question by this Court. As the majority points out, petitioner expressly asserted that privilege before the court conducting the inquiry. Since that time it is true that he has not always spelled out with meticulous specificity this self-incrimination claim under the Fifth and Fourteenth Amendments, but he has consistently and repeatedly urged that his disbarment violates the Fourteenth Amendment. And the record shows throughout that the whole confloversy has hinged around the question of the power of the State, under both the State and the Federal Constitutions, to force him to answer the questions he had been asked at the inquiry. Under these circumstances, I cannot allow to pass unnoticed the violation which I think has occurred with respect to petitioner's rights under the Fifth Amendment. Cf. Boynton v. Virginia, 364 U. S. 454, 457. While the Court seems to intimate an opposite view, its opinion appears to me actually to pass upon this federal contention.

charged is his refusal to yield a constitutional privilege, is unwarrantable."

In departing from its prior policy of fully protecting the privilege against compelled self-incrimination guaranteed by both the State and the Federal Constitutions, the . New York court relied heavily on several of this Court's recent cases.5 Those cases, I regret to say, do provide some support for New York's partial nullification of the constitutional privilege against self-incrimination. For those cases are a product of the recently emphasized constitutional philosophy under which no constitutional right is safe from being "balanced" out of existence whenever a majority of this Court thinks that the interests of the State "weigh more" than the particular constitutional guarantee involved.5 The product, of the "balancing" here is the conclusion that the State's interest in disbarring any lawyer suspected of "ambulance chasing" outweighs the value of those provisions of our Bill of Rights and the New York Constitution commanding government not to make people testify against themselves. This is a very dubious conclusion, at least to one like me who believes that our Bill of Rights guarantees are essential to individual liberty and that they state their own

<sup>\*</sup>Matter of Grav. 282 N. Y. 428, 435.

<sup>7</sup> N. Y. 2d, at 496. The cases relied upon were Lerner v. Casey. 357 U. S. 468: Beilan v. Board of Education, 357 U. S. 399; Nelson v. County of Los Angeles, 362 U. S. 1.

The majority has not even bothered expressly to "strike a balance" in these cases apparently on the theory that the value of the privilege against self-incrimination is so small that it can be "outweighed by any countervalling governmental interest. See, e. g., Nelson v. Gounty of Los Angeles, supra, at 7-8. "Nor do we think that this discharge is vitiated by any deterrent effect that California's law might have had on Globe's exercise of his federal claim of privilege. The State may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security."

values leaving no room for courts to "weigh" them out of the Constitution. The First Amendment freedoms have already suffered a tremendous shrinkage from "balancing." and here the Fifth Amendment once again suffers from the same process. I agree with Mr. Justice Douglas that the order here under review is in direct conflict with the mandate of the Fifth Amendment as made controlling upon the States by the Fourteenth Amendment. 10 - 40

In a less important area, I would be content to rest my dissent upon the single ground that a State may not penalize any person for invoking his constitutional privilege against self-incrimination. But, as I see this case, it involves other constitutional problems that go far beyond the privilege against self-incrimination—problems that

My views of this "balancing" process have been set out at length in the companion cases, Konigsberg v. State Bar of California, decided today, ante, p. —, at —, —, and In re Anastaplo, decided today, ante, p. —, at —, —. See also the opinions cited at n. 10 in my dissenting opinion in Konigsberg.

See, e. g., Wilkinson v. United States, 365 U. S. 399; Braden v. United States, 365 U.S. 431; Times Film Corp. v. City of Chicago, 365 U.S. 43; Uphaus v. Wyman, 364 U.S. 388; Barenblatt v. United States, 360 U.S. 109; Uphaus v. Wyman, 360 U.S. 72.

<sup>&</sup>quot;It is true that some inroads have already been made into the Fifth Amendment, for both Lerner v. Casey, supra, and Nelson v. County of Los Angeles, supra, rested partly upon a willingness of a majority of this Court to "balance" away the full protection of that Amendment.

This conclusion is reached primarily on the basis of agreement with the dissenting opinion of Mr. Justice Harlamin Twining v. New Jersey, 211 U.S. 78, 114-127. But even if that case were rightly decided, it would not provide support for the decision here. For the issue with regard to the privilege against self-incrimination here is quite different from the issue posed in the Twining case. In that case the only question before the Court was whether comment upon a defendant's failure to take the stand in his own defense was constitutionally permissible.

the members of the legal profession, are so important that they need to be discussed. And, as I understand the majority's opinion, it disposes of those problems on a ground that, from the standpoint of the legal profession, is the most far-reaching possible—that lawyers have fewer constitutional rights than others. It thus places the stamp of approval upon a doctrine that, if permitted to grow, as doctrines have a habit of doing, can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence.

· The unlimited reach of the doctrine being promulgated can best be shown by analysis of the issue before us as that issue was posed by the court below. In concluding that petitioner should be disbarred for reliance upon the privilege against self-incrimination, the New York Court of Appeals expressly recognized the right of every citizen. under New York law, to refuse to give self-incriminating testimony. "That right," the court said, "was his [petitioner's] as it would be the right of any citizen . . . . " But, the court reasoned, petitioner was more than an ordinary citizen. "[H]e stood before the inquiry and before the Appellate Division in another quite different capacity, also." 11 The capacity referred to was petitioner's capacity as a lawyer. In that "capacity," the court concluded, petitioner could not properly avail himself of his rights as a citizen. Thus it is clear that the theory adopted by the court below and reaffirmed by the omajority here is that lawyers may be separated into a special group upon which special burdens can be imposed even though such bardens are not and cannot be placed upon other groups. Lawyers are thus to have their legal

<sup>11 7</sup> N Y. 2d, at 495.

rights determined by something less than the "law of the land" as it is accorded to other people.

In my judgment, the theory so casually but enthusi istically adopted by the majority constitutes nothing less, than a denial to lawyers of both due process and equal protection of the laws as guaranteed by the Fourteenth Amendment. For I have always believed that those guarantees, taken together, mean at least as much as Daniel Webster told this Court was meant by due process of law. or the "law of the land," in his famous argument in the Dartmouth College case: "By the law of the land is most clearly intended the general law . . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." 12 I think it is clear that the opinion of the majority in this case says unequivocally that lawyers may not avail themselves of "the general rules which govern society."

The majority recognizes, as indeed it must, that New York is depriving lawyers, because they are lawyers, of the full benefit of a constitutional privilege available to other people. But, instead of reaching the

<sup>12</sup> Dartmouth College v. Woodward, 4 Wheat. 518, 581. See also Vanzant v. Waddel, 2 Yerger 260, in which Judge Catron, later Mr. Justice Catron, speaking for the Supreme Court of Tennessee, observed: "The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or 'LAND,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." Id., at 270. The views expressed by Webster and Judge Catron go back at least as far as 1215 and Magna Charta, in which it was provided: "No free-man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him; but by the lawful judgment of his peers or by the law of the land."

natural and, I think, obvious conclusion that such a singling out of one particular group 13 for special disabilities with regard to the basic privileges of individuals is in direct conflict with the Fourteenth Amendment,14 it chooses to defend this patent discrimination against lawyers on the theory that there are no protections guaranteed to every man who, in the words of Magna Charta, is being "anywise destroyed" by the Government. "law of the land" is therefore, in the view of the majority, an accordion-like protection that can be withdrawn from any person or group of persons whenever the Government might prefer "procedures resulting in greater certainty" if it can show some "reasonable" basis for that preference. The majority then proceeds to find such a "reasonable" basis on two grounds: first, that lawyers occupy a high position in our society "affording special opportunities for deleterious conduct" and can, by virtue of that rosition, be compelled to forego rights that are accorded to other groups; and, secondly, that the powers here exercised over petitioner by the courts of New York are no different than those exercised over lawyers by the courts of England several hundred years ago. In my judgment, neither of these grounds provides the slightest justification for the refusal of the State of New York to allow lawyers to avail themselves of "the general rules which govern society."

groups for special treatment with regard to certain constitutional privileges. See Barsky v. Board of Regents, 347 U. S. 442. That practice, which I regard as also clearly unconstitutional (see my dissenting opinion in that case, id., at 456-467), does not affect the argument here. For discrimination against one group cannot be justified on the ground that it is also practiced against another.

<sup>14</sup> Cf. Griffin v. Illinois, 351 U. S. 12. In that case, we said: "In this tradition [the tradition of Magna Charta], our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." Id., at 17.

I heartily agree with the view expressed by the majorita that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protest the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.

Nor do I believe, as the majority asserts, that the discrimination here practiced is justified by virtue of the fact that the courts of England have for centuries exercised disciplinary powers "over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." The rights of lawyers in this country are not. I hope, to be limited to the rights that English rulers chose to accord to their barristers hundreds of years ago. For it is certainly true that the courts of England could have

then, as the majority points out, made "short shrift" of any barrister who refused to "co-operate" with the King's courts." Indeed, those courts did sometimes make "short shrift" of lawyers whose greatest crime was to dare to defend unpopular causes. And in much the same manner, these same courts were at this same time using their "inherent" powers to make "short shrift" of juries that returned the wrong verdiet. History, I think, records that it was this willingness on the part of the courts of England to make "short shrift" of unpopular and unco-operative groups that led, first, to the colonization of this country, later, to the war that won its independence, and, finally to the Bill of Rights.

of England, Vol. I (2d ed.), at 477, indicates the extent to which this sort of thing was done in seventeenth-century England: "Two puritans having been committed by the high-commission court, for refusing the oath ex-officio, employed Mr. Fuller, a bencher of Gray's Inn. to move for their habeas corpus; which he did on the ground that the high commissioners were not empowered to commit any of his majesty's subjects to prison. This being reckoned a heinous offence, he was himself committed, at Bancroft's instigation, (whether by the king's personal warrant, or that of the council-board, dees not appear) and lay in gaol to the day of his death.

Hallam, op. cit. supra, n. 15, at 316, makes the following observation with regard to the duty of cooperation imposed upon English juries: "There is no room for wonder at any verdict that could be returned by a jury, when we consider what means the government possessed of securing it. The sheriff returned a pannel, either according to express directions, of which we have proofs, or to what he judged himself of the crown's intention and interest. If a verdict had gone against the prosecution in a matter of moment; the jurors must have laid their account with appearing before the starchamber; lucky, if they should escape, on humble retractation, with sharp words, instead of enormous fines and indefinite imprisonment."

Judge Catron expressed the same point in Unitarity: Waddel, supra: "The idea of a people through their-representatives, making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other

When the Founders of this Nation drew up our Constitution, they were uneasily aware of this English practice. both as it had prevailed in that country and, as it had been experienced in the colonies prior to the Revolution. Particularly fresh in their minds was the treatment that had been accorded the lawyers who had sought to defend John Peter Zenger against a charge of seditious libel before a royal court in New York in 1735.18 These two lawyers had been summarily disbarred by the judges presiding at that trial for "having presumed, (notwithstanding they were forewarned by the Court of their displeasure, if they should do it) to sign, and having actually signed, and put into court, Exceptions, in the name of John Peter Zenger; thereby denying the legality of the judges their commissions . . . . "19 It is to the lasting credit and renown of the colonial bar that Andrew Hamilton, a lawyer of Philadelphia, defied the hostility of the judges, defended and brought about the acquittal of Zenger.20

constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions, which is, and for centuries has been the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation, was the reason of its adoption as part of our constitution." 2 Yerger, at 270-271.

18 See the Trial of John Peter Zenger, 17 Howell's State Trials, 675. Zenger, a newspaper publisher, had seen fit to criticize the government and was being tried for printing "many things derogatory of the dignity of his majesty's government, reflecting upon the legislature, upon the most considerable persons in the most distinguished stations in the province, and tending to raise seditions and tumults among the people thereof." Id., at 678.

<sup>&</sup>lt;sup>19</sup> Id., at 686-687. The judges there preferred the label of "contempt" to that of "failure to co-operate."

<sup>&</sup>lt;sup>20</sup> See Dictionary of American Biography, Vol. XX, at 648-649, for the story of Hamilton's successful defense of Zenger.

Unlike the majority today, however, the Founders were singularly unimpressed by the long history of such English practices. They drew up a Constitution with provisions that were intended to preclude for all time in this country the practice of "... king "short shrift" of anyonewhether he be lawyer, doctor, plumber or thief. Thus, it was provided that in this country, the basic "law of the land" must include, among others, freedom from bills of attainder, from ex post facto laws and from compulsory self-incrimination, and rights to trial by jury after indictment by grand jury and to assistance of counsel.21 make certain that these rights and freedoms would be accorded equally to everyone, it was also provided: "No berson shall . . . be deprived of life, liberty, or property. without due process of law." 22 (Emphasis supplied.) The majority is holding, however, that lawyers are not. entitled to the full sweep of due process protections because they had no such protections against judges or their fellow lawyers in England. But I see no reason why this generation of Americans should be deprived of a part of its Bill of Rights on the basis of medieval English practices that our Forefathers left England, fought a revolution and wrote a Constitution to get rid of.23 This Court

<sup>&</sup>lt;sup>21</sup> Cf. Chambers v. Florida, 309 U. S. 227, 235-241, especially at 237, n. 10.

<sup>&</sup>lt;sup>22</sup> That command, of course, originally applied only to the Federal Government. Barron v. Baltimore, 7 Pet. 243. But with the adoption in 1868 of the Fourteenth Amendment, the same command, together with the related requirement of equal protection of the laws, became binding upon the States.

The majority asserts that it is not only "the early beginning of the practice of judicial inquiry into attorney practices . . . [but also] the long life of that mode of procedure" that justifies its decision here. This argument—that constitutional rights are to be determined by long-standing practices rather than the words of the Constitution—is not, as the majority points out, a new one. It lay at the basis of two of this Court's more renowned decisions—Dred Scott v. Sandford, 19 How. 393, and Plessy v. Ferguson. 163

should say here with respect to due process and self-incrimination what it said with respect to the freedoms of speech and press in *Bridges* v. *California*: "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press."

Instead of applying the reasoning of the Bridges case to protect the right of lawyers to avail themselves of the privilege against self-incrimination, the majority departs from that reasoning in an opinion that threatens also to restrict the freedoms of speech, press and association. For, in addition to the bare holding that a lawyer may not avail himself of the "law of the land" with respect to the privilege against self-incrimination, the opinion carries the plain implication that a lawyer is not to have the protection of the First Amendment with regard to his private beliefs and associations whenever his exercise of those freedoms might interfere with his duty to "co-operate" with a judge. It is, of course, possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the

U. S. 537. But of Brown v. Board of Education, 347 U. S. 483. The notion that a violation of the plain language of the Constitution can gain, legal stature by long-continued practice is not one I can subscribe to. A majority group, as de Tocqueville observed, too often "claims the right not only of making the laws, but of breaking the laws it has made." De Tocqueville, Democracy in America, Vol. 1, at 261.

<sup>24 314</sup> U.S. 252, 264.

This implication stems from the majority's reliance upon its opinions in the companion cases, Konigsberg v. State Bar of California, ante, p. —, and In re Anastaplo, ante, p.—. If, as the majority says, there is no constitutional difference between admission and disbarment proceedings, it seems clear that lawyers may now be called in by a State and forced to disclose their political associations on a penalty of disbarment if they refuse to do so.

lawyer's independence. But I find no such promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of "co-operation," even to the destruction of constitutional safeguards, and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. Could a lawyer who refused to "co-operate" new be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute "shady practices?" 26 Could the court peremptorily confine a lawyer in jail for contempt until he agreed to "co-operate" with the court by foregoing his privilege against self-incrimination-or renouncing his freedom of speech? \*\* Or can American courts now emulate the one-time practice of English courts of sending lawyers to jail for the "crime" of publicly advocating the repeal of laws that require people to incriminate themselves? If the requirements of due process and equal protection of the laws are observed, we know that the

The same point was persuasively urged by Mr. Justice Floyd-of the Florida Supreme Court in a concurring opinion where that court refused to adopt the rule adopted by the New York court in this case. See Sheiner v. State. 82 So. 2d 657, 664.

<sup>&</sup>lt;sup>27</sup> As shown in notes 15 and 16, *supra*, the same arguments used to justify the decision in this case would also be applicable to the supposed case for it certainly cannot be denied that such a practice had the "sanction" of English history.

Hallam, op. cit... supra. n. 15, at 287, reports the following event in early seventeenth-century England: "The oath ex officio, binding the taker to answer all questions that should be put to him, inasmuch as it contravened the generous maxim of English law that no one is obliged to criminate himself, provoked very just animadversion Morice, attorney of the court of wards, not only attacked its legality with arguments of no slight force, but introduced a bill to take it away. This was on the whole well received by the house, and sir. Francis Knollys, the stanch enemy of episcopacy, though in high office, spoke in itsefavour. But the queen put a stop to the proceeding, and Morice lay some time in prison for his boldness."

answers to these questions would be, no. But who knows how short "short shrift" can get?

The majority says that some of the evil practices I have referred to do not exist today and that they would now be held unconstitutional. The Court does not mean. of course, that the people of this country have an "absolute" right not to be subjected to such practices.29 It means rather that a majority of this Court, as presently constituted, thinks that such practices are not "justified on balance." But only 10 years ago, a different majority of this Court upheld summary imprisonment of the defense counsel in Dennis v. United States,30 on a record which indicated that the primary reason for that imprisonment was the imputation to the lawyers of what the trial judge conceived of as the unpatriotic and treasonable designs of their clients.31 Even more recently, a bare 5-4 majority of this Court prevented the temporary disbarment of a lawyer whose only "crime" lay in criticizing the manner in which the federal courts conduct trials for sedition.32 And today, this Court is upholding the refusal of two States to admit lawyers to their respective Bars solely because those lawyers would not renounce their rights under the First Amendment. 33 The sad truth is that the majority is being unduly optimistic in thinking the practices I have me tioned do not exist today.

<sup>.29</sup> This much is made indisputably clear in the majority opinion in Konigsberg v. State Bar of California, supra, at ---

<sup>30 341</sup> U.S. 494.

<sup>&</sup>lt;sup>31</sup> See Sacher v. United States, 343 U. S. 1, 19 (dissenting opinion). In my judgment the Sacher case is not altogether unlike the case of the lawyer Fuller discussed in n. 15, supra.

<sup>32</sup> In re Sawyer, 360 U. S. 622. Cf. Trial of John Peter Zenger, supra.

They may have been disguised by description in different language but the practices themselves have not changed.

It seems to me that the majority takes a fundamentally unsound position when it endorses a practice based upon the artificial notion that rights and privileges can be stripped from a man in his capacity as a lawyer without affecting the rights and privileges of that man as a man. It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profes-Moreover, even after a lawyer has been admitted to practice, a further substantial investment must be made to enable the lawyer to build up the sort of goodwill that lies at the root of any successful practice. lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they put into the case in order to build up this sort of goodwill: The lawyer's abilities, acquired through long and expensive education; and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer-both as a lawyerand as a man, assuming that such a conceptualistic distinction can be drawn.

These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing, clear requirement of the law which pronounces as the penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the "law of

the land" are satisfied, that is one thing." But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it can assert a "reasonable" justification for doing so seems to me to permit plain confiscation.

Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the "law of the land." both constitutional and statutory.

Thus I are in complete agreement with the majority that, on a constitutional level, will is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the, business of getting clients may be incomparable with a sufficient devostion to duties which a lawver owes to the court, or that the pariment of awards to persons bringing in legal business is inconsistent with the personally disinterested position a lawyer should maintain." But that state concern in preventing "ambulance chasing" is certainly no greater than the state concern in preventing any other activity which it has seen fit to make a crime. Suspected "ambulance chasers" should be no more subject to the deprivation of due process and equal protection that stems from "procedures resulting in greater certainty" than are suspected murderers. Indeed, it seems to me that if the question is to be decided on the basis of "state concern," there is no more justification for applying such summary procedures to "ambulance chasing" than for applying them to any other variety of crime.

In view of all this, I can see no justification for the notion that membership in the bar is a mere privilege conferred by the State and is therefore subject to withdrawal for the "breach" of whatever vague and indefinite "duties" the courts and other lawyers may see fit to impose on a case-by-case basis. Nearly a century ago, an English judge observed, correctly I think, that "short of those . breavy consequences which would attach to the greater. and more heinous offences. I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in such a case-perhaps, after he has devoted the best years of his life to this arduous profession.—deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace." But that is precisely what is happening here on the basis of nothing more than petitioner's "failure to co-operate" with the courts by reliance upon his constitutional privilege against self-incrimination. A man who has devoted thirty-nine years of his life to the practice of law and who, o so far as this record shows, has never failed to perform those services faithfully and honorably is being dismissed from the profession in disgrace and is having his means of livelihood taken away, from him at a point in his life when it seems highly unlikely that he will be able to find an adequate alternative means to support himself.

Quite differently from the majority. I think that the legal profession not only can but should endure what the majority refers to as the "disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure, and gradication that might follow could

<sup>\*\*</sup>Cf. Barsky v. Board of Regents, supra, at 459, 472-474 (dissenting opinions)

<sup>&</sup>quot; Hudson v. Stade 3 Foster and Finlason (Q. B.) 390, 411

miscreants only be dealt with through ordinary investigatory and prosecutorial processes." : (Emphasis supplied.) Indeed, I cannot understand how any man in this country can assume that "publicity." "delay" and "ineffectiveness" brought on by observance of due processof law can ever be disrespectable. I am not at all certain. however, that the legal profession can survive in any form worthy, of the respect we want it to have if its internal intergroup conflicts over professional ethics 37 are not rigidly confined by just those "ordinary investigatory and prosecutorial processes" which, though belittled by the majority today, are enshrined in the concepts of equal protection and due process. For if the legal profession can, with the aid of those members of the profession who have become judges, exclude any member it wishes even though such exclusion could not be accomplished within the limits of the same kind of due process that is accorded to other people, how is any lawyer going to be able to take a position or defend a cause that is likely to incur the displeasure of the judges or whatever group of his fellow lawyers happens to have authority over him? 35 The answer is that in many cases he is not going to be able to take such a position or to defend such a cause and the public will be deprived of just those legal services that, in the past, have given lawyers their most bona fide claim to greatness.

The true nature of the underlying controversy in this case, as a controversy between economically competing groups of lawyers, is shown by the fact that four different associations of attorneys filed bride amicus curiae in the present proceeding—two favorable to petitioner and two favorable to respondent.

The immense danger of departures from due process to lawyers who represent unpopular causes is dramatically illustrated in Sacher v. United States, supra. Cf. United States ex rel. Goldsby v. Harpole. 263 F. 2d 71, 82, for a discussion of another situation in which the independence of the lawyer may be crucial to his ability adequately to defend his chent.

It may be that petitioner has been guilty of some violation of law which if legally proved would justify his disbarment. It is only fair to say, however, that there is not one shred of evidence in this record to show such a violation. And petitioner is entitled to every presumption of innocence until and unless such a violation has been charged and proved in a proceeding in which he, like other citizens, is accorded the protection of all of the safeguards, guaranteed by the requirements of equal protection and due process of law. This belief that lawyers too are entitled to due process and equal protection of the laws will not, I hope, be regarded as too new or too novel.

The great importance of observing due process of law, though to some extent familiar to lawyers and laymen alike, is sometimes difficult for laymen to understand. Courts have often had to rely upon lawyers and their familiarity with the wisdom underlying these processes to explain the need for time-consuming procedures to impatient laymen. Such impatience is understandable when it comes from laymen—but it is regrettable to find it in lawyers. The respect for a rule of law administered through due process of law is the very hallmark of a lawyer—without it he cannot keep faith with his profession.

### SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM. 1960.

Albert Martin Cohen, Petitioner,
v.

Denis M. Hurley.

On Writ of Certiorari to
the Court of Appeals
of the State of New
York.

[April 24, 1961.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The privilege against self-incrimination contained in the Fifth Amendment has an honorable history and should not be downgraded as it is today. Levi Lincoln, Attorney General, objected in the hearing of Marbury v. Madison, 1 Cranch 137, 144, to answering certain questions on the ground that the answers might tend to criminate him. See Warren, The Supreme Court in United States History (1937), Vol. I, p. 237. The Court, then headed by Chief Justice Marshall, respected the privilege. Neither he nor any Justice even intimated that it was improper for a lawyer to invoke his constitutional rights. They knew

As reported in The Aurora for February, 1803, Levi Lincoln stated to the Court "[t]hat if the Court should upon the questions being submitted in writing determine that he was bound to answer them, another difficulty would suggest itself upon the principles of evidence; he would suppose the case to assume its most serious form, if in the course of his official duty these commissions should have come into his hands, that he might either by error or by intention have done wrong, it would not be expected he should give evidence to criminate himself. This was an extreme case and he used only to impress upon the Court the nature of the principle in the strongest terms."

<sup>&</sup>lt;sup>2</sup> The Court, as reported in 1 Cranch, at 144, said that the Attorney General was not obliged "to state anything which would criminate himself."

that the Fifth Amendment was designed to protect the innocent as well as the guilty. What the Court did that day reflected the attitude expressed by the Court in 1956 in Slochower v. Board of Education, 350 U.S. 551, 557, 558, when we said, "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. The privilege serves to protect the innocent who otherwise might be ensuared by ambiguous circumstances."

The lawyer in this case is in the same need of that protection as was the Attorney General in Marbury v. Madison and the professor in the Slochower case.

The American philosophy of the Fifth Amendment was dynamically stated by President Andrew Jackson who replied as follows to a House Committee investigating the spoils system:

"You request myself and the heads of the Departments to become our own accusers, and to furnish the evidence to convict ourselves." H. R. Rep. No. 194, 24th Cong., 2d Sess., p. 31.

President Grant took long absences from Washington, D. C., for recreational purposes. A House resolution asked Grant to list all his executive acts, since his election, which had been "performed at a distance from the seat of government established by law," together with an explanation of the necessity "for such performance." Grant declined, stating that if the information was wanted for purposes of impeachment ". . . it is asked in derogation of an inherent natural right, recognized in this country by a constitutional guarantee which protects every citizen, the President as well as the humblest in the land, from being made a witness against himself."

Vol. 4. Cong. Rec., Pt. 3, 44th Cong., 1st Sess., p. 2999;

H. Jour., 44th Cong., 1st Sess., p. 917.

A faithful account of the Fifth Amendment was given by Simon K. Rifkind, formerly a federal judge in the Southern District of New York who served with distinction from 1941 to 1950. He said in an address on May 3, 1954:

"Far and wide currency has been given to what I regard as the mischievous doctrine, the unconstitutional and historically false doctrine that the plea of the Fifth Amendment is an admission of guilt, an act of subversion, a badge of disloyalty.

"I confess that when I hear the words 'Fifth Amendment Communist'spoken, I experience a sense of revulsion. In that phrase I detect a denial of seven centuries of civilizing growth in our law, a repudiation of that high regard for human dignity which is the proud-hallmark of our law: That phrase makes a mockery of a practice of every court in our land-a practice which is so well-accepted that we take it for granted: Has any of you ever seen a prosecutor call a defendant to the witness stand? Of course not: you are shocked. I hope, at the suggestion. A defendant takes the stand only of his own free will. do we speak of 'Fifth Amendment burglars,' 'Fifth Amendment traffic violators, or 'Fifth Amendment anti-trust law viclators.' Nor. for that matter. would I speak of Fifth and Sixth Amendment Senators." But I do seem to recall that when the actions & of a Senator recently came under investigation, he hastened to insure that he would have the right to confront and cross-examine his accusers.

Rifkind, Reflections on Civil Liberties (American Jewish Com., mittee), pp. 12-13.

demanded that a statement of the charges be made available to him, and he insisted that he be allowed to compel the attendance of witnesses in his own behalf.

"This is not the time to go into the hoary history of the Fifth Amendment, but this much is clear: The privilege to remain silent was regarded by our ancestors as the inalienable right of a free man. To compel a man to accuse himself was regarded as a cruelty beneath the tolerance of civilized people, and it simply is not true as a matter of law that only the guilty are privileged to plead the Fifth Amendment. The innocent too have frequent occasion to seek its beneficent protection."

There is no exception in the Fifth Amendment for lawyers any more than there is for professors, Presidents,

or other office holders,

I believe that the States are obligated by the Due Process Clause of the Fourteenth Amendment to accord the full reach of the privilege to a person who invokes it. See Adamson v. California, 332 U. S. 46, 68 (dissenting opinion); Scott v. California, 364 U.S. 471 (dissenting opinion) - a position which Mr. JUSTICE BRENNAN today strengthens and reaffirms. In the disbarment proceedings. petitioner relied not only on the state constitution but on the Due Process Clause of the Fourteenth Amendment. contending that it forbade the State's making his silence the basis for his disbarment. I agree with that view. Moreover, apart from the Fifth Amendment, I do not think that a State may require self-immolation as a condition of retaining the license of an attorney. When a State uses petitioner's silence to brand him as one who has not fulfilled his "inherent duty and obligation . . . as a member of the legal profession," it adopts a procedure that does not meet the requirements of due process. Taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps more so. The State should carry the burden of proving guilt. The short-cut sanctioned today allows proof of guilt to be "less than negligible." Grunewald v. United States, 353 U. S. 391, 424.

### SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1960.

Albert Martin Cohen, Petitioner, v.

Denis M. Hurley.

On Writ of Certiorari to the Court of Appeals of the State of New York.

'[April 24, 1961.]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE joins, dissenting:

I would reverse because I think that the petitioner was protected by the immunity from compulsory self-incrimination guaranteed by the Fifth Amendment, which in my view is absorbed by the Fourteenth Amendment, and therefore is secured against impairment by the States.

In Barron v. Baltimore, 7 Pet. 243, decided in 1833, the Court held that it was without jurisdiction to review a judgment of the Maryland Court of Appeals which denied an owner compensation for his private propertytaken for public use. Chief Justice Marshall-wrote that. contrary to the contention of the owner, "the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states." This, he said, was because the first eight Amendments "contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them." 7 Pet., pp. 250-251. For over a quarter of a century after the adoption of the Fourteenth Amendment in 1869, this holding was influential in many decisions of the Court which rejected arguments for the application to the States of one after another of the

specific guarantees included in the Federal Bill of Rights. See *Knapp* v. *Schweitzer*, 357 U. S. 371, 378–379, note 5, where the cases are collected.

In 1897, however, the Court decided Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226. That case also challenged the constitutionality of a judgment of a State Surreme Court, that of Illinois, alleged to have sustained a taking of private property for public purposes without just compensation. But the property owner could now invoke the Fourteenth Amendment against the State. The Court held that the claim based on that Amendment was cognizable by the Court. On the merits, the first Mr. Justice Harlan wrote, "In our opinion, a judgment of a state court, even if it be authorized by statute. whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upofi principle and authority. wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument." U. S., p. 241. Thus the Court, in fact if not in terms: applied the Fifth Amendment's just-compensation requirement to the States, finding in the Fourteenth Amendment a basis which Chief Justice Marshall in Barron found lacking elsewhere in the Constitution.

But if suitors in state cases who invoked the protection of individual guarantees of the Bill of Rights were no longer to be turned away by the Court with Marshall's summary "We cannot so apply them," neither was the Court to give encouragement that all specifics in the federal list would be applied as was the Just Compensation Clause. Although there were Justices as early as 1892, see O'Neil v. Vermont, 144 U. S. 323, 337, 366 (dissenting opinions), as there are Justices today, see dissent of

Mr. JUSTICE DOUGLAS herein and Adamson v. California. 332 U.S. 46, 68 (dissenting opinion), urging the view that the Fourteenth Amendment carried over intact the first eight Amendments as limitations on the States, the course of decisions has not so far followed that view. specific guarantees have, however, been applied to the States. For example, while as recently as 1922, Prudential Ins. Co. W. Cheek, 259 U. S. 530, 543, the Court had said that the Fourteenth Amendment did not make the protections of the First Amendment binding on the States. decisions since 1925 have extended against state power the full panoply of the First Amendment's protections for . religion, speech press, assembly, and petition. See, e.g., Gitlow v. New York, 268 U. S. 652, 666; Cantwell v. Connecticut, 310 U. S. 296, 303; West Virginia State Board of Education v. Barnett, 319 U. S. 624; Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707; DeJonge v. Oregon, 299 U. S. 353, 364; Bridges v. California, 314 U. S. 252, 277. The view occasionally expressed that the freedom of speech and the press may be secured by the Fourteenth Amendment less broadly than it is secured by the First, see Beauharnais v. Illinois, 343 U. S. 250, 288 (dissenting opinion); Roth v. United States, 354 U.S. 476, 505-506 (separate opinion); Smith v. California, 361 U. S. 147, 169 (separate opinion), has never persuaded even a substantial minority of the Court. Again, after saving in 1914 that "the Fourth Amendment is not directed to individual misconduct of [state] . . . officials. Its limitations reach the Federal Government and its agencies," Weeks v. United States, 232 U. S. 383, 398. the Court held in 1949 that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in the concept of ordered liberty and . as such enforceable against the States . . . . Wolf v. Colorado, 338 U. S. 25, 27-28; and see Elkins v. United States, 364 U.S. 206.

This application of specific guarantees to the States has been attended by denials that this is what in fact is being done. The insistence has been that the application to the States of a safeguard embodied in the first eight Amendments is not made "because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." Twining v. New Jersey, 211 U. S. 78, 99. In other words, due process is said to be infused with "an independent potency," not resting upon the Bill of Rights, Adamson v. California, 332 U.S. 46, 66 (concurring opinion). It is strange that the Court should not have been able to detect this characteristic in a single specific when it rejected the application to the States of virtually every one of them in the three decades following the adoption of the Fourteenth . Amendment. Since "[f]ew phrases of the law are so elusive of exact apprehension as . . . [due process of ... and . . . its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise." Twining v. New Jersey, supra, at 99-100, this formulation has been a convenient device for leaving-the Court free to select for application to the States some of the rights. specifically mentioned in the first eight Amendments. and to reject others. Bu surely it blinks reality to pretend that the specific selected for application is not really being applied. Mr. Justice Cardozo more accurately and frankly described what happens when he said in Palko v. Connecticut; \$02 U.S. 319, 326, that guarantees selected by the Court "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . . " (Italics supplied.)

Many have had difficulty in seeing what justifies the incorporation into the Fourteenth Amendment of the

First and Fourth Amendments which would not similarly justify the incorporation of the other six. Even if I assume, however, that, at least as to some guarantees, there are considerations of federalism-derived from our . tradition of the autonomy of the States in the exercise of powers concerning the lives, liberty, and property of state citizens-which should overbear the weighty arguments in favor of their application to the States, I cannot follow the logic which applies a particular specific for some purposes and denies its application for others. If we accept the standards which justify the application of a specific, namely that it is "of the very essence of a scheme of ordered liberty." Palko v. Connecticut, supra, p: 325, or is included among "those fundame tal pritciples of liberty and justice which lie at the base of all our civil and political institutions," Hurtado v. California. 110 U.S. 516, 535, or is among those personal immunities. "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U. S. 97, 105, surely only impermissible subjective judgments can explain stopping short of the incorporation of the full sweep of the specific being absorbed. For example, since the Fourteenth Amendment absorbs in capital cases the Sixth Amendment's requirement that air accused shall have the assistance of counsel for his defense, Powell v Alabama, 287 U.S. 45, I cannot see how · a different or greater interference with a State's system of administering justice is involved in applying the same' guarantee in noncapital cases. Xet our decisions have fimited the absorption of the guarantee to such noncapital cases as on their particular facts "render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . . . . . Uveges v. Pennsylvania, 335 U. S. 437, 441; see also Betts v. Brady, 316 U. S. 455. Buť see McNeal v. Culver, 365 U. S. 109, 117 (concurring opinion). This makes of the process of

absorption "a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us," which, I said in *Ohio ex rel. Eaton* v. *Price*, 364 U.S., 263, 275 (dissenting opinion), I believe to be indefensible.

. The case before us presents, for me, another situation in which the application of the full sweep of a specific is denied, although the Court has held that its restraints are absorbed in the Fourteenth Amendment for some purposes. Only this Term we applied, admittedly not in terms but nevertheless in fact, the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment to invalidate a state conviction obtained with the aid of a confession, however true, which was secured from the accused by duress or coercion. v. Richmond, - U. S. -; and see Bram v. United States, 168 U. S. 532. And not too long ago we invalidated a state conviction for illegal possession of morphing based on evidence of two capsules which the accused had swallowed and then had been forced by the police to dis-Rochin v. California, 342 U. S. 165. Court today relies upon earlier statements that the immunity from compulsory self-incrimination is not secured by the Fourteenth Amendment against impairment by the States. These statements appear primarily in Twining v. New Jersey, supra, and Adamson Q. California, supra. Those cases do not require the conclusion Neither involved the question here prereached here. sented of the constitutionality of a penalty visited by a State upon a citizen for invoking the privilege. Both involved only the much narrower question whether comment upon a defendant's failure to take the stand in his own defense was constitutionally permissible.

However, all other reasons aside, a cloud has plainly been cast on the soundness of *Twining* and *Adamson* by

our decisions absorbing the First and Fourth Amendments in the Fourteenth. There is no historic or logical reason for supposing that those Amendments secure more important individual rights. I need not rely only on Mr. Justice Bradley's famed statement in Boyd v. United States, 116 U. S. 616, 632, that compulsory self-incrimination "is contrary to the principles of a free government. It is abhorrent to the instincts of an . . . American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." I may also call to my support the more current appraisa! in the same vein in Ullmann v. United States, 350 U.S. 422, 426-428. The privilege is rightly designated "one of the great landmarks in man's struggle to make himself civilized." Griswold, The Fifth Amendment Today, [1955] 7. But even without the support of these eminent authorities. I believe that the unanswerable case for absorption was stated by the first Justice Harlan in his dissent in Twining, supra, p. 114. Therefore, with him: "I cannot support any judgment declaring that immunity from self-incrimination is not . . . a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action." Id., at 126. The degree to which the privilege can be eroded unless deterred by the Fifth Amendment's restraints is forcefully brought home in this case by the New York Court of Appeals' departure from its former precedents. See Judge Fuld's dissent. 7 N. Y. 488. — . — N. E. 2d — . — .

I would hold that the full sweep of the Fifth Amendment privilege has been absorbed in the Fourteenth Amendment. In that view the protection it affords the individual, lawyer or not, against the State, has the same scope as that against the National Government, and, under our decision in Slochower v. Board of Education, 350 U.S. 551, the order under review should be reversed.